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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GICC CAPITAL CORP.,

Petitioner,

vs.

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS, WILLIAMSON, GRAHAM & WILLIAMSON, GORDON LOCKE, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, TFG ACQUISITION CORP. and ARTHUR KRONENBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether 18 U.S.C. § 1961(5) of the Racketeering Influenced and Corrupt Organizations Act, which defines a "pattern of racketeering activity" as at least two acts of racketeering activity that occur within a ten-year period, should be subject to artificial, non-statutory barriers, such as a one-year temporal requirement, or a civil-criminal case distinction, in conflict with statutory text, legislative history, and Supreme Court precedent, and aggravating an existing split of authority within and among the Circuits.

Whether a "pattern of racketeering activity" is stated under RICO by allegations of a two-year fraudulent conveyance scheme which ended only when available funds had been looted and the district court entered a restraining order barring overseas transfers of looted funds.

LIST OF THE PARTIES' AFFILIATES

All parties appear in the caption of the case on the cover page. There are no parent companies or non-wholly owned subsidiaries of petitioner. Upon information and belief, there are no parent companies or non-wholly owned subsidiaries of respondents.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

GICC Capital Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-11a) is reported at 67 F.3d 463 (2d Cir. 1995). The Court of Appeals' denial of GICC's Petition for Rehearing and Suggestion of Rehearing *En Banc* (App., *infra*, 12a) is unreported. The opinion of the District Court (App., *infra*, 25a-29a) is

reported at 891 F. Supp. 64 (D. Conn. 1994). A prior appeal in the case is reported at 30 F.3d 289 (2d Cir. 1994).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on October 6, 1995 (App., *infra*, 1a-11a). The Court of Appeals denied a timely Petition for Rehearing and Suggestion of Rehearing *En Banc*, on January 3, 1996 (App., *infra*, 12a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED[1]

Section 1961(5) of RICO, the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, defines a "pattern of racketeering activity" as at least two acts of racketeering activity that occur within a ten-year period.

Section 1961(1) of RICO defines "racketeering activity" as a variety of illegal acts, including mail fraud, wire fraud and bankruptcy fraud.

Section 1962(a) of RICO renders it unlawful for any person to use or invest income derived "from a pattern of racketeering activity" in acquisition of an interest in, or in operation of, an enterprise engaged in interstate commerce.

Section 1962(b) of RICO renders it unlawful for any person through a "pattern of racketeering activity" to acquire or maintain, directly or indirectly, any interest in or control of an enterprise engaged in interstate commerce.

Section 1962(c) of RICO renders it unlawful for any person employed by or associated with an enterprise engaged in interstate commerce, to conduct or participate in the conduct of the enterprise's affairs, directly or indirectly, through a "pattern of racketeering activity."

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[1] The pertinent text of the statutory provisions involved in this case are set out verbatim in the Appendix, *infra*, 31a-32a.

Section 1964(c) of RICO provides that any person injured in his business or property by reason of a violation of Section 1962 is entitled to a treble damage remedy, plus costs and attorneys' fees.

STATEMENT OF THE CASE

This case involves a multi-faceted scheme of fraudulent conveyance activity occurring over a more than two-year period pursuant to which the Respondents systematically transferred millions of dollars in cash and assets from respondent Technology Finance Group, Inc. ("TFG") to respondent Creative Resources, Inc. ("CRI") and its subsidiaries and affiliates, including respondent Apple Leasing, Inc. ("Apple"), in derogation of the right of GICC and TFG's other creditors. Respondents' gross misconduct was accomplished through a "pattern of racketeering activity" which involved settlement fraud, corporate restructuring, repurchases of multiple investor interests, domestic and overseas transfers of cash and assets, SEC filings, and as a fait accompli, the sale of TFG to a worthless shell. The net effect of the scheme is that CRI stripped TFG of its assets, leaving TFG insolvent, and ensuring that TFG would be unable to meet its obligations to its multiple creditors, including one of its primary creditors, GICC.

The fraudulent scheme was engineered by individual respondents Andrew Graham ("Graham"), Dennis Williamson ("Williamson") and Gordon Locke ("Locke"), through their corporate vehicles, respondents CRI, Graham & Williamson ("G&W"), Apple, and TFG, and accomplished with the approval of CRI's Board of Directors, which included respondents James T. Pierce ("Pierce") and Walter H. Prime ("Prime"). It was completed with the assistance of respondent Arthur Kronenberg ("Kronenberg"), whose shell entity, TFG Acquisition Corp. ("TFG Acquisition"), purchased TFG for nominal consideration in February, 1991, and contemporaneously released CRI, Apple and TFF, Inc. ("TFF") from any and all claims that TFG might have against them. As a result of Respondents' fraudulent scheme, GICC is left holding a worthless promissory note from TFG.

GICC's complaint alleges, among other things, a pattern of racketeering activity, violating 18 U.S.C. §§ 1961 *et seq.*, arising from Respondents' series of fraudulent conveyances each comprised of multiple RICO predicate acts, occurring over a two-year period (the "Complaint"). Accordingly, the subject matter jurisdiction of the district court was predicated upon federal question jurisdiction, 28 U.S.C. § 1331, arising under 18 U.S.C. § 1964(c) (RICO).

A. The Fraudulent Conveyance Scheme

Respondents' scheme had six principal components (App., *infra*, 37a-52a).

1. Settlement Fraud

In early 1990, GICC was actively pursuing claims against TFG. That litigation resulted in a settlement, in March of 1990, when Respondents induced GICC to accept delivery of a $500,000 back-end loaded promissory note (the "GICC Note") (App. *infra*, 38a-39a). At no time during the negotiation of the terms of issuance of the GICC Note did Respondents ever disclose that, at the same time they were agreeing to cause TFG to issue the GICC Note, they intended to strip TFG of sufficient assets to meet the obligations contained in the GICC Note (App., *infra*, 55a-56a). As is set forth below, even prior to Respondents' March 1990 settlement with GICC, they had already begun, unbeknownst to GICC, to loot TFG (App., *infra*, 37a-38a).

The back-end loading of GICC's promissory note was of importance to Respondents. By structuring the note to accrue interest in 1990, adding the interest to principal, and providing for interest-only payments during 1991, with interest and principal amortization not starting until 1992, Respondents gave themselves almost two years to complete their stripping of TFG's assets before significant payments became due to GICC.

Not long after commencing principal payments, TFG defaulted on the GICC Note, thus entitling GICC to declare the Note in default on December 10, 1992 (App., *infra*, 38a-39a). No payment has been made by TFG since then. As a result,

there is now due and owing to GICC the sum of $407,021.07 with per diem interest of $110.66 from December 28, 1992 (App., *infra*, 39a, 53a). In addition to this default, because of CRI's fraudulent transfers, TFG is unable to meet its remaining payment obligations on the GICC Note.

Respondents' failure to disclose their plan to strip TFG of assets is alleged to have been willful and fraudulent. (App., *infra*, 36a-52a). Had GICC known of Respondents' plan to strip TFG of assets it would not have accepted the Note, at least not without a guarantee from CRI (App., *infra*, 55a-56a). The mails and wires of course had to be used to accomplish these transactions.

2. Corporate Restructuring

In mid-1989, Respondents took control of CRI to loot it and its affiliates (App., *infra,* 37a-38a). One of CRI's subsidiaries, TFG, was in the computer leasing business. TFG purchased computer equipment, borrowed funds on a non-recourse basis to make the purchase, and then leased the equipment to an initial end-user for a specified period of time. TFG then typically sold the computer equipment, in a sale-and-leaseback transaction to an investor, such as an equipment trust. The term of the investor lease was for a longer period of time than the initial end-user lease, enabling TFG to remarket the computer equipment from the end of the end-user lease until the end of the investor's lease, for an agreed-upon sharing of the re-marketing proceeds (also called the "residuals") (App., *infra*, 36a-37a).

TFG also had its own subsidiary, Apple. During the same time that TFG was sued by an affiliate of GICC, the settlement of which resulted in the issuance of the GICC Note, respondents Graham, Williamson and Locke caused TFG to transfer Apple to CRI (App., *infra*, 40a). The purchase price was $10,000 -- which is, in a commercial context, nominal consideration. The purpose of this "sale" was to enable any monies collected by Apple to be transferred directly to CRI rather than having to be sent through TFG, which would have subjected these monies to TFG's creditors, including GICC.

Instead of indirect ownership of Apple through TFG, CRI then had direct ownership of Apple in a parallel relationship with TFG, giving CRI the opportunity to loot TFG (App., *infra*, 40a, 45a-47a).

By transferring Apple, CRI was able to route transactions through that entity without changing CRI's consolidated financial reporting position, and without having to subject those transactions to claims of TFG's creditors, including GICC (App., *infra*, 40a). Profits made by Apple, which otherwise would have to be dividended through TFG, could be dividended to CRI directly, bypassing TFG and its creditors. These corporate restructuring transactions inevitably involved the use of the mails and wires. They marked the mid-1989 beginning of Respondents' scheme.

Significantly, Respondents accomplished the mid-1989 transfer of Apple prior to the March 1990 delivery of the GICC Note, and failed to disclose this material corporate restructuring to GICC during the settlement negotiations leading up to the GICC Note (App., *infra*, 37a-40a). Upon execution of the GICC Note, GICC believed that Apple was still a subsidiary of TFG. Had GICC been aware of the Apple transfer, and the fraudulent conveyances which had at that time just begun, GICC would not have accepted the Note, at least not without a guarantee from CRI (App., *infra*, 55a-56a). The reason it was so important for Respondents to placate GICC was that, as a restive creditor, GICC threatened the early 1990 unravelling of the then-young scheme.

All of these transactions inevitably involved the use of the mails and wires. No corporate restructuring can be accomplished without some use of the mails and wires having been made.

3. Repurchase of Multiple Investor Interests

Beginning in February, 1990, Apple embarked on a program devised by Graham and Williamton and run by Locke to repurchase the interests of investors in leased equipment (App., *infra*, 40a-41a). Respondents Williamson, Graham and Locke,

with the approval of the CRI Board, caused CRI to lend Apple money -- hundreds of thousands of dollars -- to purchase these investors' interests (App., *infra*, 40a-43a). Apple would then earn substantial profits on these repurchase transactions -- totalling more than $1 million -- that should have gone instead to TFG. Had Apple not been sold by TFG to CRI, the "upstreaming" of these Apple profits would have gone to TFG, and its creditors (App., *infra*, 40a-43a, 45a).

TFG would advise investors, by mail, and/or then by telephone, that the investors' interests were worth very little (App., *infra*, 41a). If the investor agreed to sell his interest, then TFG would mail a check to that investor. If TFG could make these purchases cheaply, it would profit to the extent that actual remarketing proceeds from computer equipment exceeded the purchase price paid by TFG to buy back the investor's interest in the equipment. The obvious and only explanation for structuring the transactions in the manner in which they were structured was to enable TFG to be "bypassed" (App., *infra*, 41a, 45a-47a).

Respondents' scheme was comprised of dozens upon dozens of such looting transactions, each involving multiple investor purchases and multiple uses of the mails and wires. A typical example was the SCB trust (App., *infra*, 42a-43a). There, thirteen investor interests had been established by TFG to own and lease computer equipment. CRI caused Apple to repurchase twelve of those interests, for a total of less than $10,000 in cash, notes and stock. Within approximately one month, CRI realized, through Apple, approximately $800,000 on the sale of equipment (App., *infra*, 42a). Respondents did not disclose to the investors that an offer to sell the equipment for a eighty-fold profit was pending when the investor trust interests were repurchased (App., *infra*, 42a). Many other similar examples could be cited, involving other trusts and investors.

This typical transaction illustrates the magnitude of the fraudulent conveyances, and the variety of the means by which Respondents accomplished their scheme to obstruct repayment of TFG's debts to GICC and other creditors.

Inherent in each of the fraudulent conveyances committed by Respondents are a multitude of separate violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (App., *infra*, 57a-58a). The scheme involved not only the corporate restructuring of CRI, to move Apple away from TFG, but also multiple interest re-purchases and multiple transfers of funds between CRI and Apple, each of which inevitably involved multiple checks and bank transfers, enabling Respondents to funnel the resulting profits away from TFG and its creditors, including GICC (App., *infra*, 37a-38a, 40a-47a).

Respondents' fraudulent scheme is actually set forth in CRI's public filings with the SEC (App., *infra*, 45a-51a), albeit in a fashion which is almost impossible to understand. For example, in its July, 1991 10-K filed with the SEC, CRI stated an increase in cash that was due in large part to TFG lease residuals which were funneled through Apple, and then on to CRI, and from TFG residuals which were also transferred to CRI directly (App., *infra*, 45a).

Further, in its Form 10-K for the year ended March 31, 1990, which was not filed with the SEC until December 4, 1990, CRI stated that it was meeting its "working capital requirements . . . from collections by the Company from its lease portfolio" (App., *infra*, 46a). This means that CRI, and its subsidiary TFG, were taking lease residuals collected by TFG (on behalf of TFG's investors) and then transferring those monies either to Apple and then on to CRI, or to CRI directly, keeping those lease residuals as CRI's own and using those residuals for CRI's operating expenses rather than paying the residuals over to investors, or using them to pay claims against TFG (App., *infra*, 46a-47a).

In addition, in the March 31, 1990 10-K, CRI stated that it was "borrowing funds from and deferring payment to limited partnerships managed by TFG's subsidiary," admitting that it was taking monies from lease residuals from TFG and Apple and not paying those monies to investors who were entitled to them (App., *infra*, 45a-46a).

4. Subordination of GICC's Debt to CRI and Insolvency of TFG

Throughout 1990, Apple and TFG transferred huge sums of monies to CRI to allegedly discharge intracorporate debts (App., *infra*, 41a-42a). First, Williamson admitted in an affidavit, dated September 24, 1991, that TFG sent approximately $3.1 million to CRI from the period January 1989 to January 1991. Further, during discovery, GICC learned that from January 1990 through January 1991, Apple transferred over $1 million to CRI (App., *infra*, 45a-50a). These monies were paid to CRI on a preferred basis, where any "debts" owed by TFG or Apple to CRI should have been subordinated to claims of the general creditors of the entities, including GICC. In addition, because these monies rightfully belonged to TFG and its creditors, this repayment accentuated TFG's insolvency (App., *infra*, 46a).

5. Sale of TFG to a Worthless Shell Company for Nominal Consideration

In order to make it that much more difficult for TFG's creditors to recover from TFG, on February 1, 1991, CRI's shell subsidiary, TFF, with the approval of CRI's directors and officers, sold TFG to another company with no assets, TFG Acquisition, a shell company owned by Kronenberg (App., *infra*, 44a-45a, 47a-48a, 51a-52a). Kronenberg's worthless entity, TFG Acquisition, purchased TFG for $10,000 -- the same price CRI "paid" for Apple -- and CRI "forgave" over $1.1 million owed by TFG to CRI.

The purpose of this transaction was to strip away TFG from CRI and to give away TFG so that (i) CRI did not have to report an insolvent subsidiary as a part of its consolidated financial statement, which Williamson admitted in his affidavit and at his deposition; (ii) TFG could go bankrupt without directly affecting CRI; and (iii) it would be that much more difficult for TFG's creditors to recover against TFG (App., *infra*, 44a-45a, 47a-48a). Thus, having stripped TFG clean,

Respondents set it adrift, and even caused TFG to give to CRI a non-arm's length release.

Here, too, the mails and wires had to have been used.

6. Transfer of Assets Out of the Country

CRI transferred in excess of $1 million to its foreign subsidiaries, making it still more difficult to recover those assets (App., *infra*, 44a, 50a-51a). This transfer of assets abroad continued even after GICC's service of its Complaint, and while GICC's motion to restrain such transfers was pending but had not yet been heard by the district court.

Thus, while these funds were still in CRI on a consolidated financial reporting basis, Respondents made it more difficult to recover those proceeds for the benefit of GICC and TFG's other unsecured creditors by moving the proceeds offshore, even after being served with the Complaint, and even one day prior to a September 1991 hearing with the district court below, where that court issued a restraining order against overseas transfers. (App., *infra*, 44a). These transfers also required the use of the mails and wires.

The net effect of this fraud on TFG's creditors was the diversion and funnelling by CRI of more than $2 million in cash into CRI, from mid-1989 through September of 1991 (App., *infra*, 43a-44a). As a result, TFG was left insolvent and TFG's creditors were left without adequate sources of repayment. The transfers have left TFG with virtually no cash since all, or almost all, of its cash was funnelled to Apple and then to CRI, or to CRI directly, and TFG's liabilities substantially exceeded its assets. Respondents have admitted TFG's insolvency.

This scheme was aimed at all of TFG's many creditors. In its early stages, however, GICC became TFG's most restive creditor, and it brought a prior lawsuit. GICC did not know about the transfer of Apple at the time. It also did not know that CRI was causing the repurchase of trust investor interests at a substantial profit, creating a pool of money as a source of possible payment, but then divesting those proceeds away

from TFG. All GICC knew was that it was not being paid. TFG quickly settled the litigation in March of 1990, for some cash plus delivery of a back-end loaded promissory note to GICC. By structuring the settlement in this way -- particularly with respect to the back-end loaded promissory note -- Respondents succeeded in keeping GICC at bay while they completed the looting. Special actions directed at GICC therefore were critical to the success of Respondents' scheme.

B. Proceedings Below

GICC served its Complaint on September 13, 1991,[2] setting forth six causes of action, including a claim alleging a pattern of racketeering activity under RICO, 18 U.S.C. §§ 1961, *et seq.*

After initial skirmishing by the parties, which resulted in a temporary restraining order ("TRO") restricting Respondents from transferring monies abroad, the Respondents served motions to dismiss the Complaint, on October 25, 1991 and November 12, 1991. On February 4, 1992, United States Magistrate Judge Arthur H. Latimer issued a ruling recommending that Respondents' motions to dismiss be granted. The Magistrate Judge adopted Respondents' argument that, because there had not been at that point a default in the GICC Note, there was no cognizable injury.

On February 28, 1992, GICC filed a timely objection to the Magistrate Judge's ruling before the United States District Court for the District of Connecticut, District Judge Warren W. Eginton (the "District Court"). While the objection was pending before the District Court, TFG in fact defaulted on the GICC Note in December of 1992. As a result of the default on the Note, the District Court referred the matter back to Magistrate Judge Latimer, by order dated January 28, 1993.

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[2] GICC served an Amended Complaint on March 24, 1993, incorporating a cause of action against TFG for its default on the GICC Note (App., *infra*, 33a-59a).

On June 15, 1993, Magistrate Judge Latimer again issued a ruling recommending that Respondents' motions to dismiss be granted, this time on the ground that GICC lacked standing under RICO because Respondents' looting harmed TFG, and GICC's harm, as a creditor of TFG, was merely derivative. GICC submitted a timely objection to this recommended ruling on July 23, 1993. On August 27, 1993, District Judge Eginton affirmed the recommended ruling, and a final judgment was entered by the District Court in favor of all Respondents and against GICC on August 31, 1993.

GICC filed a timely notice of appeal from the final judgment of the District Court on September 13, 1993. On July 11, 1994, the Second Circuit reversed the decision of the District Court in favor of GICC and against all Respondents in all respects. The Second Circuit held that, based on the "timing," "magnitude" and "rapacious nature" of Respondents' alleged looting, GICC's Complaint satisfied the directness of injury required for RICO standing (App., *infra*, 13a-22a). *GICC Capital Corp. v. Technology Finance Group*, 30 F.3d 289, 293 (2d Cir. 1994).

On August 12, 1994, Respondents renewed their motions to dismiss, for a third time. On December 21, 1994, District Judge Eginton, again granted dismissal of GICC's Complaint on the ground that it did not sufficiently plead a pattern of racketeering activity (App., *infra*, 25a-29a), *GICC Capital Corp. v. Technology Finance Group*, 891 F. Supp. 64 (D. Conn. 1994), and a final judgment was entered by the District Court in favor of all Respondents and against GICC on December 28, 1994 (App., *infra*, 30a).

GICC filed a timely notice of appeal from the final judgment of the District Court on January 19, 1995. The Second Circuit affirmed the decision of the District Court, on October 6, 1995 (App., *infra*, 1a-11a). *GICC Capital Corp. v. Technology Finance Group*, 67 F.3d 463 (2d Cir. 1995). The Court of Appeals held that GICC had not satisfied RICO's "pattern" requirement. Applying a one-year temporal requirement and a stricter construction of the "pattern" element in the case of a

civil RICO action, as compared with criminal prosecutions, the Second Circuit held that GICC had not stated either closed-ended or open-ended continuity so as to adequately allege a pattern under RICO (App., *infra*, 6a-10a). Likewise, on January 3, 1996, the Court of Appeals denied a timely Petition for Rehearing and Suggestion *En Banc* (App., *infra*, 12a).

Accordingly, the question presented here is whether a one-year temporal requirement, a civil-criminal RICO distinction, or a timing of the termination restriction, should preclude a multi-faceted fraudulent conveyance scheme -- involving dozens of transactions, multiple violations of the mail and wire fraud statutes, and the intentional looting of millions of dollars by and among four corporate entities, a partnership and six individuals -- from being pled as a "pattern of racketeering activity" under civil RICO.

REASONS FOR GRANTING THE PETITION

Seven years after this Court last deliberated on the meaning of the term "pattern of racketeering activity," the "widest and most persistent Circuit split on an issue of federal law," as then described by members of this Court continues to plague our judicial system. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, Rehnquist, O'Connor and Kennedy, JJ., concurring). The Second Circuit's decision below (App., *infra*, 1a-11a) exemplifies the confusion faced by the lower courts and their resulting inability to apply in a consistent manner the enigmatic "pattern" element enunciated by Congress and construed by this Court. Conflicting decisions that expound artificial barriers unsupported by the statute or this Court's precedent -- for example, distinguishing activities by their "inherently unlawful" nature,[3] or applying a

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[3] *See, e.g., United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995) (applying less stringent standard to a three-and-a-half month scheme that was characterized as "inherently unlawful"); *see also, infra*, part II.B.

"bright-line, one-year rule"[4] -- continue to proliferate rapidly in and among virtually all circuits. Recognizing that Congress has left the judiciary with significant ambiguity in regard to a key statutory element, GICC is sympathetic to the difficulties faced by the lower federal courts in providing meaning to RICO's "pattern" requirement. Understandably, the need for guidance from this Court is acute. Considering the nature and number of persons ultimately affected by the statute's criminal sanctions and civil remedies, the issue that this case addresses is important and the continuing conflicts in and among the circuits warrant clarification by this Court.

I. The Second Circuit's Narrow Interpretation of RICO's "Pattern" Requirement Conflicts With the Statute's Broad Reach As Well As With this Court's Construction of the Statute

Congress incorporated into RICO a liberal construction clause[5] in order to combat fraudulent and other illegitimate activities. As a deterrence mechanism and a stimulant to private enforcement, Congress also included a treble-damage award and reasonable attorneys' fees for anyone injured in his business or property by reason of a "pattern of racketeering activity." 18 U.S.C. §§ 1962, 1964(c). The statute defines a "pattern" to "require[] at least two acts of racketeering activity . . . within ten years . . . ." 18 U.S.C. § 1961(5).

On each of the six occasions that this Court has considered the scope of RICO, it has upheld the literal and far-reaching meaning of the statute and expressly declined to interpret

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[4] *See, e.g., Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) ("a bright line, one-year rule undermines *H.J. Inc.*'s principle that flexibility rather than rigidity should govern the application of RICO"); *see also, infra*, part II.A.

[5] The liberal construction clause directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." 84 Stat. 947 (1970). Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 1970 U.S.C.C.A.N. (84 Stat.) 4036 (codified as amended at 18 U.S.C. § 1961 *et seq.*).

RICO restrictively or to engraft limitations not found within the four corners of the statute.[6] This Court's approach to the key "pattern" element is exemplified by its seminal decisions in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), both of which are implicitly ignored by the Second Circuit's narrow reading of the "pattern" requirement in its decision in this case below. These two decisions demonstrate that Respondents' conduct, as alleged here, falls squarely within RICO's "pattern" requirement.

Sedima eliminated significantly judicially created restrictions on "garden variety" civil RICO suits, holding that such claims did not require both a prior criminal conviction and proof of a special "racketeering injury."[7] 473 U.S. at 493. In rendering this decision, the Court emphasized that the statutory text did not support, and legislative history did not envision, such a narrow reading of the statute. *Id.* The Court's "pattern" analysis was equally compelling. While intimating that a more meaningful concept of pattern was necessary, the Court declined to rewrite the statute. *Id.* at 499-500. The Court noted that "while two acts [of racketeering activity] are necessary, they may not be sufficient" to form a pattern. *Id.* at 496 n.14. Thus, in order to prevent the application of RICO to two "isolated" acts of racketeering activity, a "continuity plus relationship" should be applied to determine the existence of a

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[6] *See National Organization for Women, Inc. v. Scheidler*, ____ U.S. ____, 114 S. Ct. 798, 803, *reh'g denied*, ____ U.S. ____, 114 S. Ct. 1340 (1994) (scope of enterprise and pattern elements); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (standing limitations); *H.J. Inc. v. Northern Bell Tel. Co.*, 492 U.S. 229 (1989) (pattern element); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (standing limitations; pattern element, in dicta); *Russelo v. United States*, 464 U.S. 16 (1983) (scope of forfeiture); *United States v. Turkette*, 452 U.S. 576 (1981) (scope of enterprise element).

[7] In *Sedima*, a foreign corporation that had entered into a joint venture with an American corporation commenced a civil-RICO action when it believed that it was being cheated out of a portion of its revenues by the American corporation's alleged overbilling. 473 U.S. 479, 483-484.

"pattern." *Id.* (quoting Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969)). No further requirements were construed or applied by this Court.

In rendering its opinion, the Court expressly acknowledged that, while its ruling might broaden the statute's application, such a liberal construction is consistent with the remedial principles underlying the RICO statute.

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expanded language and overall approach, . . . but also of its express admonition that *RICO is to be liberally construed to effectuate its remedial purposes*. . . . The statute's remedial purpose is nowhere more evident than in the provision of a private action for those induced by racketeering activity.

Id., 473 U.S. at 497-498 (emphasis added) (citations omitted). Moreover, even if section 1964(c) of RICO was "evolving into something quite different from the original conception of its enactors" and was "being brought almost solely against such respondents [respected businesses], rather than against the archetypal, intimidating mobster," this Court determined that "this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress." 473 U.S. at 499.

This Court in *H.J.* attempted further to develop a meaningful concept of "pattern." Holding that a "pattern of racketeering activity was established,"[8] the Court expressly rejected the Eighth Circuit's restrictive "multiple scheme" interpretation of the "pattern" requirement,[9] finding no basis for it in either

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[8] In *H.J.*, the customers of a telephone company brought a class-action lawsuit, alleging that the company gave members of the state utility commission numerous bribes, with the single objective of causing commissioners to approve unfair and unreasonable rates. 492 U.S. 229, 233-35.

[9] The Court of Appeals for the Eighth Circuit, in affirming the District Court's dismissal of plaintiffs' complaint, held that "[a] single fraudulent

(Footnote continued)

the statute or the legislative history. 492 U.S. at 240-41. Instead, the Court adopted the liberal conception of "pattern" recognized by *Sedima*, holding that to prove a "pattern of racketeering activity," a plaintiff "must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity." *H.J.*, 492 U.S. at 239.

For analytical purposes, the *H.J.* Court separately defined the constituents of RICO's "pattern" requirement, namely "continuity" and "relatedness," while recognizing that, in practice, their proof will overlap. *Id.* The Court explained that the interrelationship between acts may be established in a number of ways, including proof of their similarity of goals, results, participants, victims, methods of accomplishment, or otherwise distinguishing characteristics. *Id.* at 240. Like relatedness, the Court recommended a flexible approach to continuity, describing "both a closed- and open-ended concept, [which] refer[s] either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition . . . ." *Id.* at 241.

Notwithstanding the Court's attempt at a "meaningful concept," the concurring judges severely criticized the majority opinion for having done "little more than repromulgate . . . hints as to what RICO means . . . ." *H.J.*, 492 U.S. at 251 (Scalia, Rehnquist, O'Connor, Kennedy, JJ., concurring). Characterizing the decision's resulting uncertainty and vagueness as "intolerable," the concurring opinion correctly predicted that the courts of appeals will be no more "unified in the future, than they have in the past, regarding the content of this law." *Id.* at 255.

GICC submits that the broad requirements of "pattern" articulated in *Sedima* and *H.J.* are clearly satisfied by GICC's

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effort or scheme is insufficient" to establish a "pattern of racketeering activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989). This Court expressly rejected this narrow reading of the RICO statute, and reversed the decision. *H.J.*, 492 U.S. 229, 250.

Complaint, which alleges that Respondents, as part of their scheme to defraud TFG's creditors, committed a multitude of fraudulent conveyances during a more than two-year period. By narrowly interpreting the statute and applying artificial barriers, such as a one-year minimum requirement, an "unlawfulness" qualification, and an inconsistent view with respect to the magnitude and extent of the racketeering activities, the Court of Appeals' decision below runs counter to the statute, the legislative history, and this Court's precedent.

II. The Second Circuit's Decision Aggravates the Existing Split of Authority Within and Among the Circuit Courts

As predicted by the concurring opinion in *H.J.*, this Court's RICO decisions have continued to generate controversy, particularly with regard to the "pattern" concept. Absent long-awaited Congressional reform, the federal courts have vented their frustration, understandably, by seeking to develop their own solutions. Many decisions, including the Court of Appeals' below, have disregarded Supreme Court directives regarding the breadth of RICO and reined in the statute by imposing, in an inconsistent and unpredictable manner, artificial barriers that are unsupported by statutory text, legislative history or Supreme Court precedent. The result is utter confusion and a complete lack of uniformity. Absent review by this Court, these difficulties will only worsen, with increasing disarray among the lower courts, and without any realistic prospect for resolution of the decisional conflict.

For example, in an effort to limit civil RICO's reach, many lower courts have imposed overly restrictive standards for what constitutes a pattern and have arbitrarily rejected "pattern" claims on the following grounds: (i) the absence of at least one year of racketeering activity; (ii) the absence of "inherent unlawfulness" with respect to the activities at issue (leading to the resurrection of a civil-criminal RICO distinction previously rejected by this Court in *Sedima*); (iii) the termination of racketeering activity prior to commencement of the lawsuit; (iv) the absence of multiple victims; (v) the

absence of a separate "pattern" as to each victim, notwithstanding allegations of multiple victims; and (vi) the absence of a "significant societal" injury. These judicially-created limitations have severely hampered the effectiveness of RICO, particularly in the area of white-collar wrongdoing, to an extent never envisioned by Congress or by this Court. They also have caused conflicts amongst the circuits, as the courts of appeal have struggled to limit civil RICO's reach beyond the broad and literal terms set forth in the statute.

A. Bright Line One-Year Rule

Many lower courts, including the Second Circuit in this case, have arbitrarily suggested that a duration of one year is an absolute prerequisite to constitute a "pattern". *See, e.g., Primary Care Inv., Seven v. PHP Healthcare*, 986 F.2d 1208, 1215 (8th Cir. 1993) (deeming ten-to-eleven month scheme insufficient merely on account of duration, holding that "[o]ther circuits have consistently held that the requirement of continuity . . . is not met if predicate acts extend less than one year"); *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992) (six- or seven-month scheme insufficient), *cert. denied*, 503 U.S. 832 (1992); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 953 F.2d 587, 593 (11th Cir.) (six months to a year insufficient), *reh'g denied*, 961 F.2d 224 (1992); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991) ("twelve months is not a substantial period of time" for purposes of establishing pattern of racketeering activity), *cert. denied*, 504 U.S. 955 (1992); *J.D. Marshall Int'l v. Redstart Inc.*, 935 F.2d 815, 821 (7th Cir. 1991) (thirteen months is not substantial under RICO); *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989) (predicate acts with single goal over one-year period do not form pattern).

The Second Circuit in its decision below indicated its agreement with this approach when allegedly faced with the following circumstances:

> . . . [A]llegations of a pattern of racketeering lasting at most from the time the defendants allegedly induced plaintiff to accept a promissory note in March

> 1990, until TFG's sale to TFG Acquisition in February 1991.
>
> As noted above, we have twice found closed-ended continuity since the Supreme Court's decision in *H.J. Inc.*, and in each case the alleged pattern extended for a longer period of time.
>
> * * *
>
> We are not prepared to conclude that the specific racketeering activities alleged in this case, occurring over less than one year and without a threat of future criminal activity, constitute the sort of 'long-term criminal conduct' that Congress sought to target in RICO.

GICC Capital Corp., 67 F.3d at 467, 469.

In addition to mischaracterizing the facts of the case -- GICC alleges that the looting scheme lasted more than two years, starting well before March of 1990, in mid-1989 when Respondents assumed control of CRI, and lasting until September of 1991 when the last overseas transfers were made -- the Second Circuit's bright-line one-year test is nowhere found in the RICO statute or in this Court's precedent. *See*, *supra*, part I.

While this Court has previously stated that "[p]redicate acts extending over a few weeks or months . . . do not satisfy the requirement," *H.J.*, 492 U.S. at 242, it has never engrafted anything amounting to a bright line one-year rule. Moreover, Justice Scalia's concurring opinion in *H.J.* criticized the majority opinion for allowing "a few months of racketeering activity (and who knows how much more?) . . . for free." *Id.* at 254 (Scalia, J., concurring). The lesson to be learned by future civil racketeers in light of the Second Circuit's decision here reflects Justice Scalia's criticism -- if you engage in a fraud, engage in it quickly and make sure it is over in less than a year. Nonetheless, there is not a shred of language in RICO to the effect that a one-year period is a minimum demarcation line.

Further, this unfounded one-year rule has led to a clear conflict amongst the circuit courts, most recently evidenced by the Second Circuit's opinion in this case, and the Ninth Circuit's decision in *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995), holding that a "bright line, one-year rule . . . would contradict the fluid concept of continuity enunciated by the Supreme Court in *H.J.*".[10]

The absence of support in either statutory text or Supreme Court precedent for this overly rigid one-year barrier, compounded by the clear circuit conflict that exists, necessitates the intervention of this Court.

B. Civil-Criminal Case Distinction

The lower courts also have also attempted to limit civil RICO's reach by adding an "inherently unlawful" qualification to the "pattern" analysis that has led to the application of different standards for civil as compared with criminal RICO cases, despite the fact that (i) such a distinction is not consistent with RICO's text, and (ii) previous attempts to create such a distinction have generally met with reversal by this Court. *H.J.*, 492 U.S. 229, 248-249 ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad range of perpetrators operating in many different ways."); *Sedima*, 473 U.S. 479, 499 (civil RICO is properly used against "respected and legitimate enterprises" since they "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."); *see Fleet Credit Corp. v. Sion*, 893 F.2d 441, 447 (1st Cir. 1990) (*H.J.*'s analysis permits RICO actions against "businessmen" for ordinary contract fraud claims, whenever those claims include specific allegations demonstrating a pattern of mail or wire fraud).

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[10] In *Allstate*, a recycling company sued its former officers under RICO, alleging that they and their families solicited kickbacks, received and distributed illicit gratuities and commissions, and created false receipts, thus overcharging the company for the transportation of goods and services. 65 F.3d 1523, 1526-27.

In the decision below, the Second Circuit suggested a distinction between civil and criminal RICO cases, as follows:

> An inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. . . . Where the nature of the conduct or the enterprise does not by itself suggest that the racketeering acts will continue, courts must look to other external factors.

GICC Capital Corp., 67 F.3d at 466 (citations omitted).

Such a distinction is not limited to this case. For example, in *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995), the Second Circuit held that a three-month scheme of embezzlement qualified as "inherently unlawful," thus constituting a RICO pattern,[11] while in *GICC Capital Corp.*, 67 F.3d 463, 469, the Second Circuit found that a two-year multi-faceted fraudulent conveyance scheme involving hundreds of instances of mail and wire fraud was not the "sort of long-term criminal conduct that Congress sought to target in RICO, and, therefore, would not constitute a RICO pattern."

Other circuits have also interpreted RICO's "pattern" requirement more generously in criminal than in civil cases, using a less than one-year test. *Compare United States v. Busacca*, 936 F.2d 232 (6th Cir.) (two-month period of embezzlement sufficed to evince a threat of continuity), *cert. denied*, 502 U.S. 985 (1991), and *United States v. Link*, 921 F.3d 1523 (11th Cir. 1991) (possession of drugs with intent to distribute on two occasions within one year held to be pattern), *cert. denied*, *D'Amico v. United States*, 500 U.S. 958

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[11] In *Aulicino*, the Second Circuit distinguished between enterprises on the one hand that are "inherently unlawful" and "were in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement" and those on the other hand that are "not inherently unlawful, such as frauds in the sale of property." The former, the Second Circuit suggested, have the required continuity "by the nature of the activity," regardless of the duration of the activity, while the latter require a longer duration. 44 F.3d at 1111.

(1991), *with Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir. 1994) (finding no threat of continuity where construction-contract fraud spanned 17 months), *cert. denied*, ___ U.S. ___, 115 S. Ct. 579 (1994), and *Aldridge v. Lily-Tulip, Inc. Salary Retirement Benefits Committee*, 953 F.2d 587, 593 (11th Cir.) (finding no pattern where employer's alleged improper termination of employees' benefits was accomplished during a six-month to one-year period), *reh'g denied*, 961 F.2d 224 (11th Cir. 1992).

Such a distinction is completely inconsistent with this Court's precedent. In *Sedima*, this Court expressly rejected an effort by the Second Circuit to engraft a criminal conviction requirement onto civil RICO claims. *See* 473 U.S. 479, 493 ("[w]e can find no support in the statute's history, its language or considerations of policy for a requirement that a private treble damages action . . . can proceed only against a defendant that has been criminally convicted."). Further, in *H.J.*, this Court wrote that the organized crime limitation on RICO had been discredited and could not be read into the statute. See 492 U.S. at 248-49 ("[i]t would be counterproductive and a misdemeanor of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus"). Thus, the Second Circuit's "inherently unlawful" test in GICC, in which criminal RICO cases are permitted to have shorter "patterns" than civil cases, threatens to resurrect these discredited doctrines.

Moreover, in making this "inherently unlawful" distinction, construing the "pattern" requirement more liberally in criminal than in civil cases, the lower courts have violated a well-established rule of statutory construction, namely that penal laws should be more strictly construed than civil laws. 3 Norman J. Singer, *Statutes and Statutory Construction*, § 59.03 (4th ed. 1986).

For these reasons as well, this Court should grant certiorari so as to resolve this conflict.

C. Termination of Racketeering Activity Prior to Commencement of Suit

The Second Circuit below also has followed erroneously the lead of the Sixth and Seventh Circuits in rejecting as a pattern conduct that is terminated on or before the commencement of litigation. *GICC Capital Corp.*, 67 F.3d at 466 (looting of corporate assets does not satisfy continuity requirement when there are no more assets to loot); *Thompson v. Paasche*, 950 F.2d 306, 311 (6th Cir. 1991) (defendants' scheme, which involved the sale of nineteen lots of property and was completed months prior to commencement of lawsuit, lacked requisite continuity); *American Eagle Credit Corp. v. Gaskings*, 920 F.2d 352, 354-55 (6th Cir. 1990) (applying "hindsight" analysis, court held that allegedly fraudulent sales of medical equipment occurring prior to lawsuit failed to satisfy continuity requirement); *Olive Can Co. v. Martin*, 906 F.2d 1147, 1152 (7th Cir. 1990) (threat of continuing activity only need be considered in the event the perpetrators are caught before the scheme is completed). Like the one-year rule and the civil-criminal distinction, the timing of the termination restriction is not supported by statutory text or by this Court's precedent and has caused further confusion regarding the "pattern" element within and amongst the circuits.

Such a requirement is a catch-22, ultimately penalizing the victims and benefitting the victimizers. For example, if a plaintiff files suit before enough time has elapsed to establish continuity, the threat of continued racketeering activity typically will not exist. *See*, *supra*, part II.A. It is only natural for the perpetrators to cease their RICO activity upon the commencement of litigation or the indictment of one or more of the participating respondents. Indeed, most fraudulent activity has some kind of natural ending-point. If the Second Circuit's hindsight analysis were adopted, civil RICO fraud claims would be all but impossible to plead.

To be consistent with *H.J.*'s "common-sense everyday" approach, other courts have recognized that a pattern must be

examined at the time of the activity rather than after the racketeering has ceased. *See, e.g., United States v. Busacca*, 936 F.2d 232, 238 (6th Cir.) (fortuitous interruption of criminal acts does not preclude a finding of open-ended continuity; long-term criminal conduct may be interrupted, by termination, the commencement of the RICO action, arrest, indictment or guilty verdict), *cert. denied, Busacca v. U.S.*, 502 U.S. 985 (1991); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 n.4 (9th Cir. 1987) ("the fact that the last of a series of predicate acts may have completed the criminal scheme does not necessarily preclude a finding of continuity"). Otherwise, the pattern requirement would rarely be satisfied, as commencement of litigation or prosecution usually brings about termination of the illicit conduct.

Only this Court can determine whether the "timing of termination" requirement is supported by the statute and judicial precedent. GICC submits that it is not.

D. Other Confusing and Conflicting "Pattern" Tests Also Exist

Several other tests, not directly adopted by the Second Circuit in this case, have nevertheless been employed by other circuits to limit civil RICO's reach in a confusing and conflicting manner. Granting certiorari in this case can assist other circuits in interpreting what is a "pattern" under RICO.

1. Absence of Multiple Victims and/or Multiple Schemes

Some courts have rejected an otherwise well-pleaded pattern because of the absence of multiple victims. *See Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir. 1994) (finding that "defendant who engage[d] in several different forms of fraud for a single purpose, to defraud a single victim through activities surrounding one construction project" over a seventeen-month period, did not meet pattern requirement"), *cert. denied*, ___ U.S. ___, 115 S. Ct. 579 (1994); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684-85 (4th Cir. 1989) (if case involves "but one perpetrator," "but one set of victims" and

"actions... narrowly directed to a single fraudulent goal," the pattern requirement is not met); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266-68 (7th Cir. 1990) (finding that defendant's several acts of mail and wire fraud did not meet pattern requirement since there was only one victim).

Contrary to these decisions, there is no support for the conclusion that the number of victims should be determinative of the pattern element. *See, e.g., Uniroyal Goodrich Tire Corp., v. Mutual Trading Corp.*, 63 F.3d 516, 524 (7th Cir. 1995) ("[t]he repeated infliction of an economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO"), *cert. denied, Mutual Trading Corp. v. Uniroyal Goodrich Tire Corp.*, ___ U.S. ___, 116 S. Ct. 916 (1996); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990) (*H.J.* did not allude to other factors, such as the number of victims or the variety of acts).

Like the multiple-scheme requirement rejected by *H.J.*, the multiple-victim analysis is equally irrelevant; it "appears nowhere in the language or legislative history of the Act." *H.J.*, 492 U.S. at 241.

2. Absence of a "Pattern" as to Each Victim

Some courts have declined to consider predicates involving victims other than the named plaintiff, holding that a pattern may consist only of predicates involving the plaintiff. See, e.g., *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 n.4 (9th Cir. 1992) (holding that plaintiff lacked "standing to assert the wrongs done to another party"); *Feinstein v. RTC*, 942 F.2d 34, 46 (1st Cir. 1991) ("duration must be measured by the particular respondent's fraudulent activity, rather than by otherwise innocuous or routine mailings that may continue for a long period of time thereafter"). Under this reasoning, a perpetrator who injures hundreds or thousands of victims can escape RICO liability if he is careful to injure each victim only once.

Other circuit courts, namely the First, Third and Seventh, have vehemently disagreed with this misguided interpretation of the "pattern" element, a further example of the conflicts

amongst the circuits and the absolute need for resolution by the Court. *See, e.g., Town of Earney v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987) (pattern may include victims other than plaintiff); *Marshall & Isley Trust Co. v. Pate*, 819 F.2d 806, 809 (7th Cir. 1987) (victim not required to show injury directly resulting from all predictate acts constituting pattern). ". . .[N]owhere in either the text of RICO or the case law is there any suggestion that *each victim* of an alleged pattern of racketeering activity must have suffered at least two predicate acts at the hands of the defendant." *Libertad v. Welch*, 53 F.3d 428, 438 n.5 (1st Cir. 1995).

3. Absence of Significant Societal Threat

Some courts have implied that, even if the technical requirements of RICO are otherwise met, the case may be rejected for lack of a pattern if the conduct at issue does not pose a "significant societal threat." *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1267-68 (7th Cir. 1990) (although numerous acts of extortion, mail and wire fraud were committed, pattern not found because defendant did not pose a "significant social threat"); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 596-97 (3d Cir. 1990) ("[g]iven its natural and common sense approach to RICO's pattern element, we think it unlikely that Congress intended RICO to apply in the absence of a more significant societal threat"); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (must show that "ongoing unlawful activities . . . pose a special threat to social well-being"). Such a subjective standard would inevitably become a latent organized crime limitation, something which *Sedima* and *H.J.* disfavored completely.

* * *

It is evident that, in the seven years since this Court's decision in *H.J.*, there is still substantial confusion in the lower courts as to what constitutes a RICO "pattern." This confusion involves a significant issue of federal law, which is of considerable practical importance to large numbers of judges and litigants. GICC submits that the time has come for this

Court again to sort out the law on this issue by granting certiorari in this case.

III. The Decision of the Court of Appeals is Erroneous and Conflicts With the Court's Own Decision on a Prior Appeal

An additional reason to grant certiorari is that the Second Circuit's decision is in conflict with that court's decision of a prior appeal in the very same case. Other federal courts seeking to interpret the Second Circuit's decision will be faced with two very different descriptions of the facts, leading them to wonder to which set of facts the "pattern" principles enunciated in the second decision should be applied. Thus, in addition to being in conflict with decisions from other circuits, the Second Circuit's irreconcilable decisions threaten to foment additional confusion and further conflict in the future.

On the first appeal in this case, the Second Circuit referred to the "timing," "magnitude" and "rapacious nature of the looting," which it held on that appeal "fairly posit[ed] the directness of injury required for RICO standing." *GICC Capital Corp.*, 30 F.3d 289, 293 (2d Cir. 1994). There, the court specifically described the case as involving "a series of transactions by the [Respondents] from 1989 to 1991 [which] fraudulently stripped TFG of its assets and inevitably resulted in TFG's default on the note." 30 F.3d at 291. A "series of transactions," to a layperson, is a "pattern." And mid-1989 to the fall of 1991 is the period of the pattern alleged by GICC, running from when Respondents first took control of TFG and CRI, to when their overseas transfers ceased by entry of a temporary restraining order by the District Court.

On the second appeal, however, the Second Circuit held that while GICC had standing to assert a RICO claim, it had not stated one. *GICC Capital Corp.*, 67 F.3d at 466. The manner in which the Court of Appeals construed the facts on the second appeal assumed critical importance in its conclusion that GICC had not adequately alleged open-ended and closed-ended continuity. This court misconstrued the facts, as follows:

> We first examine the temporal aspect of plaintiff's claim. GICC alleges a two-year period of racketeering activity; GICC variously identifies the starting point of that period as (1) the individual CRI defendants' takeover of CRI (in June 1989); (2) the transfer of Apple Leasing Co. to CRI (at an unspecified time between June 1989 and March 1990); and (3) the issuance of a promissory note in favor of GICC (in March 1990). Because GICC does not allege any racketeering activity in connection with the individual CRI defendants' takeover of CRI, the takeover cannot form the starting point of defendants' pattern of racketeering activity. GICC attempts to plead violations of the mail and wire fraud statutes in connection with the transfer of Apple Leasing from TFG to CRI. However, GICC alleges that the transfer was "fraudulent" in the sense that it was not disclosed to GICC prior to GICC's acceptance of the promissory note. Based on the amended complaint, we cannot conclude that plaintiff has alleged mail and wire fraud in connection with the actual transfer of Apple Leasing from TFG to CRI. We are left, then, with allegations of a pattern of racketeering lasting at most from the time the defendants allegedly induced plaintiff to accept a promissory note in March 1990, until TFG's sale to TFG Acquisitions [sic] in February 1991.

GICC Capital Corp., 67 F.3d at 467.

By describing the pattern of fraudulent conveyances in this fashion -- inaccurately -- the Second Circuit shortened the pattern and made it more discrete, thus buttressing its conclusion that there was no adequate allegation of continuity. The mid-1989 takeover of CRI and the transfer of Apple were necessary parts of the fraudulent conveyance scheme and thus a part of the RICO "pattern" (App., *infra*, 37a-38a, 40a). And the scheme did not come to an end merely when the investor repurchases ceased; TFG had to be sold and cast adrift, which it was in February of 1991, and the funds had to be secreted,

which they were until the fall of 1991 (App., *infra*, 40a-44a). The Second Circuit in its second opinion thus curtailed both the start and the end of the "pattern" in stark contrast to the accurate description articulated in its first opinion.

We are cognizant that this Court does not grant certiorari to become enmeshed in the factual details of a particular case. However, by describing the fraud as lasting from mid-1989 to the fall of 1991 in the first opinion, and then shortening it to March 1990 to February 1991 in the second opinion, the Second Circuit's second opinion will exacerbate future confusion over the meaning of RICO's "pattern" requirement. Lower courts will have to ask whether there really is a minimum one-year civil RICO "pattern" test, and if so, whether in light of the facts described in the first Second Circuit opinion it is really a two-year test. Avoiding the difficulties which such future confusion will present makes this, GICC submits, an especially compelling case for this Court to grant certiorari. Not only can granting certiorari in this case resolve past Circuit conflicts over construction of RICO's "pattern" requirement, it also can prevent future confusion and additional conflicts as well, which the Second Circuit's opinions will undoubtedly engender if certiorari is not granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1925 August Term, 1995

(Argued: September 15, 1995 Decided:(October 6, 1995)

Docket No. 95-7102

GICC CAPITAL CORP.,

Plaintiff-Appellant,

v.

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS WILLIAMSON, GRAHAM & WILLIAMSON, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, GORDON LOCKE, TFG ACQUISITION CORP., and ARTHUR KRONENBERG,

Defendants-Appellees.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, *Circuit Judges.*

Appeal from an order of the United States District Court for the District of Connecticut (Warren W. Eginton, *Judge*), granting appellees' motions to dismiss for failure to state a claim. The district court held that appellant had failed to establish that appellees' conduct constituted continuous criminal activity or posed a threat thereof, and that appellant had therefore not alleged a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act. The court dismissed appellant's remaining state law claims for lack of any basis for supplemental jurisdiction.

Affirmed.

RICHARD P. SWANSON, Reid & Priest, New York, New York (Pamela C. Tames, of counsel) for *plaintiff-appellant*.

EUGENE R. SCHEIMAN, Baer, Marks & Upham, New York, New York (David P. Atkins, Zeldes, Needle & Cooper, Bridgeport, Connecticut, Anthony De Toro, New York, New York, of counsel) for *defendants-appellees* Andrew Graham, Dennis Williamson, Graham & Williamson, Gordon Locke, Creative Resources, Inc., TFF, Inc., Apple Leasing, Inc., James T. Pierce, Walter H. Prime.

FREDERIC S. URY, Ury & Moscow, Westport, Connecticut, for *defendants-appellees* Technology Finance Group, Inc., TFG Acquisition Corp., Arthur Kronenberg.

JOSÉ A. CABRANES, *Circuit Judge:*

Plaintiff GICC Capital Corp. ("GICC") brought this action against two groups of defendants that allegedly participated in the looting of assets from defendant Technology Finance Group, Inc. ("TFG"). TFG defaulted on a promissory note issued to GICC in settlement of unrelated litigation. GICC claims that the defendants engaged in a series of schemes designed to defraud GICC by permitting TFG to escape its obligation under the note. GICC alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1968), and various state law fraud claims. The district court, adopting a ruling of Magistrate Judge Arthur H. Latimer, granted defendants'

motions to dismiss for failure to state a claim on August 26, 1993, finding that GICC lacked standing under RICO.[1] We reversed and remanded. *GICC Capital Corp. v. Technology Finance Group, Inc.*, 30 F.3d 289 (2d Cir. 1994). On remand, the district court granted defendant's renewed motions to dismiss plaintiff's RICO claim. The court concluded that plaintiff had failed to demonstrate that defendants' conduct amounted to continuous criminal activity or a threat thereof, and that plaintiff had therefore not alleged a "pattern of racketeering activity" under RICO. The district court also dismissed plaintiff's state law claims, finding no basis for the exercise of supplemental jurisdiction. On appeal, GICC contends that the district court erred in adopting an overly narrow view of RICO's "continuity" requirement.

I. Facts

For purposes of this decision, we take the facts alleged in plaintiff's amended complaint to be true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). GICC holds a $500,000 promissory note issued by defendant TFG as part of a March 1990 settlement of unrelated litigation involving TFG and a principal of GICC. TFG defaulted on the note in December 1992. The amount due on the note stands at $407,021.07, with *per diem* interest of $110.66 since December 28, 1992.

Defendant Creative Resources Inc. ("CRI") is a holding company that conducts its business through a group of subsidiaries. CRI was controlled, during the times relevant, by defendants Andrew Graham, Gordon Locke, James T. Pierce, Walter H. Prime, Dennis Williamson, and Graham & Williamson (a partnership of defendants Graham and Williamson). Until February 1991 defendant TFG was owned by TFF, Inc., a CRI subsidiary. TFG was in the business of leasing computer equipment. TFG would borrow funds, purchase equipment, lease the equipment to an initial end-user, and

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[1] By the some order, the district court dismissed plaintiff's federal securities claim. Plaintiff did not appeal this ruling.

direct the rental payments to the lender. At the same time, it would "sell" the equipment to an investor, who would reap certain tax benefits from formal ownership. The investor, in turn, would lease the equipment back to TFG for a term longer than the term of TFG's lease with the initial end-user. For the remainder of the longer term, TFG would re-lease the equipment to a second end-user. Because TFG's loan would already be paid off, the second end-user rental payments would be available as profits, which TFG would share with the investor. TFG and the investor would thus each hold a "residual" interest—that is, rights to a portion of the second end-user rental income. TFG apparently held some of these residual interests, while others were held by its subsidiary, Apple Leasing Co.

GICC's complaint alleges that CRI and those who controlled it (1) at some time between June 1989 and March 1990 caused Apple Leasing to be transferred from TFG to CRI for no consideration, permitting CRI rather than TFG to benefit as Apple's parent from the income to which Apple was entitled under residual interests; (2) in March 1990, fraudulently induced GICC to accept a $500,000 note from TFG as part of a settlement agreement; (3) caused money to funnel out of TFG and into CRI by permitting Apple, rather than TFG, to repurchase investors' residual interests at a profit; (4) in February 1991, caused the transfer of TFG to defendant Arthur Kronenberg and his company, defendant TFG Acquisition Corp., for nominal consideration; and (5) at an unspecified time, shifted assets from CRI to an overseas subsidiary of CRI. GICC alleges that these transfers were designed to defraud TFG's creditors, including GICC.

II. Discussion

Section 1962 of RICO outlaws (a) the use of income "derived . . . from a pattern of racketeering activity" to acquire an interest in, establish, or operate an enterprise engaged in or affecting interstate commerce; (b) the acquisition of any interest in or control of such an enterprise "through a pattern of racketeering activity"; (c) the conduct or participation in

the conduct of such an enterprise' affairs "through a pattern of racketeering activity"; and (d) conspiring to do any of the above. GICC alleges that all of the defendants violated § 1962(c), and that all of the defendants except TFG and TFG Acquisition violated § 1962(a) and § 1962(b). Under any prong of § 1962, a plaintiff in a civil RICO suit must establish a "pattern of racketeering activity." The plaintiff must plead at least two predicate acts, *see* § 1961(5), and must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The district court concluded that the plaintiff had failed to satisfy the so-called "continuity" requirement.

In *H.J. Inc.*, the Supreme Court outlined the basic contours of the continuity requirement as follows:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

492 U.S. at 241-42 (emphasis in original) (citation omitted). Thus, a plaintiff in a RICO action must allege either an "open-ended" pattern of racketeering activity (*i.e.*, past criminal conduct coupled with a threat of future criminal conduct) or a "closed-ended" pattern of racketeering activity (*i.e.*, past criminal conduct "extending over a substantial period of time"). The district court concluded that GICC failed to allege either a closed- or open-ended continuity here. We agree.

A. Open-Ended Continuity

Our cases assessing whether a threat of continuity exists have looked first to the nature of the predicate acts alleged or to the nature of the enterprise at whose behest the predicate acts were performed. *See, e.g., United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995); *United States v. Kaplan*, 386 F.2d 536, 542 (2d Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990); *United States v. Indelicato*, 865 F.2d 1370, 1383-84 (2d Cir.) (en banc), *cert. denied*, 493 U.S. 811 (1989); *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir.) (en banc), *vacated and remanded*, 492 U.S. 914, *adhered to on remand*, 893 F.2d 1433, *cert. denied*, 493 U.S. 992 (1989). Thus, an inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. *Aulicino*, 44 F.3d at 1111. Where the nature of conduct or the enterprise does not by itself suggest that the racketeering acts will continue, courts must look to other external factors. *Kaplan*, 886 F.2d at 542.43. Thus, in *Beauford*, we found allegations that defendants had engaged in a one-time mailing of 8,000 copies of fraudulent documents in connection with a condominium conversion plan sufficient to plead a pattern of racketeering activity, where there was a basis to infer that similar mailings would occur in the future. *Beauford*, 865 F.2d at 1392. Similarly, in *Azrielli v. Cohen Law Offices*, 21 F.3d 512 (2d Cir. 1994), we concluded that a series of fraudulent sales of securities over at least one year, coupled with fact that the defendants "apparently ha[d] been trying to continue to sell" securities, permitted a jury to find a RICO pattern. *Id.* at 521.

GICC does not allege that the nature of the defendants' conduct itself gives rise to a threat of continuity. Rather, GICC attempts to establish a threat of continuity by alleging that (1) the defendants would have continued to loot TFG if not for the fact that all available funds had already been looted; and (2) CRI would have continued to transfer money overseas had GICC not commenced litigation. We find plaintiff's first argument unpersuasive. Even if we assume that

defendants' scheme was designed to deprive TFG of its assets, it is clear that the scheme was *inherently* terminable. It defies logic to suggest that a threat of continued looting activity exists when, as plaintiff admits, there is nothing left to loot. For example, the predicate acts alleged in connection with the repurchases of residual investor interests—that is, mail and wire fraud—*could not* have continued once the pool of investor interests available for repurchase was exhausted. Indeed, plaintiff's claim that all available funds had been looted itself suggests that CRI had completed its wave of repurchasing. As for plaintiff's second claim, we find it entirely speculative. We conclude that GICC's allegations are not sufficient to suggest a threat of continuity.

B. Closed-Ended Continuity

We find similarly unpersuasive GICC's allegations that a closed-ended pattern of racketeering activity exists. Since *H.J. Inc.*, in which the Supreme Court made clear that closed-ended continuity can only be shown through conduct occurring over "a *substantial* period of time," 492 U.S. at 242 (emphasis supplied), we have found closed-ended continuity only twice. In *Jacobson v. Cooper*, 882 F.2d 717 (2d Cir. 1989), we concluded that predicate acts occurring over "a matter of years," from approximately 1980 to 1988, satisfied the continuity rerequirement. *Id.* at 720. Similarly, in *Metromedia v. Fugazy*, 983 F.2d 350 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993), we found erroneous a jury instruction that "a few weeks or months" might constitute "a substantial period of time," but upheld a RICO verdict in favor of the plaintiff because the predicate acts in question spanned at least two years. *Id.* at 369; *see also Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc.*, 879 F.2d 10, 18 (2d Cir. 1989) (concluding, prior to Supreme Court's decision in *H.J. Inc.*, that allegations of predicate acts occurring over "period of nearly two years" as part of a five-part fraudulent scheme were sufficient to plead pattern of racketeering activity), *cert. denied*, 493 U.S. 1022 (1990).

Plaintiff contends that the district court erroneously characterized the alleged activities of the various defendants as part of "a single short-lived scheme," and notes that, in any event, RICO does not require that a plaintiff demonstrate multiple schemes or goals. In *Indelicato*, we concluded that Congress did not mean "to exclude from the reach of RICO multiple acts of racketeering simply because they achieve their objective quickly or because they further but a single scheme." 865 F.2d at 1383; *see also Beauford*, 865 F.2d at 1391. That multiple schemes are not required in all circumstances does not mean that the number and nature of the schemes alleged by a plaintiff in a given case are entirely irrelevant. Rather, a plaintiff must provide some basis for a court to conclude that defendants' activities were "neither isolated nor sporadic." *Id.* We find that no such basis exists here.

Since *H.J. Inc.*, other courts of appeals—as well as lower courts in this circuit — have attempted to measure whether closed ended continuity exists by weighing a variety of non-dispositive factors, including, *inter alia*, the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes. *See, e.g., Vicom v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 780 (7th Cir. 1994); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1412-13 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991); *Polycast Technology Corp. v. Uniroyal, Inc.*, 728 F. Supp. 926, 948 (S.D.N.Y. 1989).

We first examine the temporal aspect of plaintiff's claim. GICC alleges a two-year period of racketeering activity; GICC variously identifies the starting point of that period as (1) the individual CRI defendants' takeover of CRI (in June 1989); (2) the transfer of Apple Leasing Co. to CRI (at an unspecified time between June 1989 and March 1990); and (3) the issuance of a promissory note in favor of GICC (in March 1990). Because GICC does not allege any racketeering activity in connection with the CRI defendants' takeover of CRI, the takeover cannot form the starting point of defendants' pattern of racketeering activity. GICC attempts to plead

violations of the mail and wire fraud statutes in connection with the transfer of Apple Leasing from TFG to CRI. However, GICC alleges that the transfer was "fraudulent" in the sense that it was not disclosed to GICC prior to GICC's acceptance of the promissory note. Based on the amended complaint, we cannot conclude that plaintiff has alleged mail and wire fraud in connection with the actual transfer of Apple Leasing from TFG to CRI. We are left, then, with allegations of a pattern of racketeering lasting at most from the time the defendants allegedly induced plaintiff to accept a promissory note in March 1990, until TFG's sale to TFG Acquisitions in February 1991.

As noted above, we have twice found closed-ended continuity since the Supreme Court's decision in *H.J. Inc.*, and in each case the alleged pattern extended for a longer period of time. Those courts of appeals considering the issue have consistently refused to treat predicate acts occurring over a similar (or even longer) period of time a "pattern of racketeering activity" under RICO. *See Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir.) (finding single-victim scheme lasting seventeen months insufficient to show continuity), *cert. denied*, 115 S. Ct. 529 (1994); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991) (holding that "twelve months is not a substantial period of time" for purposes of establishing pattern of racketeering activity), *cert. denied*, 504 U.S. 955 (1992); *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 821 (7th Cir. 1991) (concluding that thirteen months is not substantial under RICO); *Menasco v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989) (holding that predicate acts with single goal occurring over one-year period do not form pattern); *see also Metromedia*, 983 F.2d at 369 (noting that "[p]eriods of 19 or 20 months . . . have been held sufficient to support a finding of continuity"); *Religious Technology Ctr. v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (per curiam) (noting that "[w]e have found no case in which a court [of appeals] has held the requirement to be satisfied by a pattern of activity lasting less than a year"). Though an approach giving such weight to the duration of criminal activities alleged in connection with a closed-ended

pattern of racketeering activity is undoubtedly somewhat mechanistic, we believe that it is required to effectuate Congress's intent to target "long-term criminal conduct." *H.J. Inc.*, 492 U.S. at 242, *see id.* at 243 n.4 ("[W]hen Congress said predicates must demonstrate 'continuity' before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity."); *see also* S. REP. NO. 91-617, at 158 (1969) (explaining pattern requirement); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (discussing RICO's legislative history). As the Court suggested in *H.J. Inc.*, continuity is "centrally a temporal concept." 492 U.S. at 242.

Plaintiff provides no other basis for concluding that the defendants' acts satisfy the continuity requirement. The activities alleged involved only a handful of participants. Plaintiff attempts to allege that the defendants' activities affected multiple victims, including investors whose residual interests were purchased at a discount and other creditors. Nevertheless, plaintiff does not identify any other victims, nor state in anything but general terms the nature of their purported injuries. Finally, plaintiff contends that defendants' activities are properly characterized as a "multi-faceted scheme," and that it is settled law in this Circuit that similar activities extending over a similar period of time form a pattern. That is simply not the case. Of the cases the plaintiff cites for this proposition, all but one involved a threat of continuity, *see Azrielli*, 21 F.3d at 521; *Morrow v. Black*, 742 F. Supp. 1199, 1207 (E.D.N.Y. 1990); *Amsler v. Corwin Petroleum Corp.*, 715 F. Supp. 103, 105 (S.D.N.Y. 1989), or a considerably longer period of time, *see Toto v. McMahan, Brafman, Morgan & Co.*, No. 93 CIV. 5894, 1995 WL 46691, at *3 (S.D.N.Y. Feb. 7, 1995); *Constellation Bank, N.A. v. C.L.A. Management*, No. 94 CIV. 0989, 1995 WL 42285, at *2, *3 (S.D.N.Y. Feb. 1, 1995).[2] Only one case arguably supports plaintiff's statement.

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[2] In addition, plaintiff relies on cases not directly discussing the continuity requirement, also distinguishable from the instant case. See *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 43 (2d Cir. 1994) (affirming district

(Footnote continued)

See Polycast, 728 F. Supp at 926, 948 (finding that allegations of multiple acts of mail and wire fraud and securities law violations over eight-and-a-half month period established RICO pattern). That case was not appealed to this court. In any event, it is sufficient to note that plaintiff's allegations do not present a "complex, multi-faceted conspiracy to defraud executed by numerous officers and stockholders" similar to that which the district court faced in *Polycase*. *See id.*

We are not prepared to conclude that the specific racketeering activities alleged in this case, occurring over less than one year and without a threat of future criminal activity, constitute the sort of "long-term criminal conduct" that Congress sought to target in RICO. Accordingly, the judgement of the district court is affirmed.

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court's finding of RICO liability for three-year scheme); *Turkish v. Kasenetz*, 27 F.3d 23, 27 (2d Cir. 1994) (finding predicate acts in connection with allegations of settlement fraud in 1987 and extortion in 1991); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1164 (2d Cir.) (finding mail and wire fraud occurring over five-year period), *cert. denied*, 114 S. Ct. 385 (1993).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January one thousand nine hundred and ninety-six.

GICC Capital Corp.

Plaintiff-Appellant

v. Dkt No: 95-7102

Technology Finance

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant GICC Capital Corp.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
GEORGE LANGE III, CLERK
/s/ 1/3/96
By: Arthur M. Heller,
Administrative Attorney

Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1189 August Term, 1993

Argued: February 24, 1994 Decided: July 11, 1994

Docket No. 93-7982

GICC CAPITAL CORP.,

Plaintiff-Appellant,

-against-

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS WILLIAMSON, GRAHAM & WILLIAMSON, GORDON LOCKE, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, TFG ACQUISITION CORP., and ARTHUR KRONENBERG,

Defendants-Appellees.

Before: LUMBARD, VAN GRAAFEILAND, and JACOBS, *Circuit Judges*.

Appeal from a September 2, 1993 judgment of the District of Connecticut, Eginton, *J.*, dismissing federal securities and RICO claims for failure to state a claim, and dismissing state law claims on jurisdictional grounds. Plaintiff accepted a large note from defendant corporation in settlement of prior litigation, and alleged that defendants stripped defendant corporation of its assets and caused the note and settlement to become worthless. The district court held that plaintiff lacked RICO standing because defendants proximately caused injury only to defendant corporation and not to its creditors.

Reversed.

RICHARD P. SWANSON, New York, New York (Reid & Priest, New York, New York, Pamela C. Tames, of counsel), for Plaintiff-Appellant.

FREDERIC S. URY, Westport, Connecticut (Rubenstein and Ury, Westport, Connecticut, of counsel), for Defendants-Appellees Technology Finance Group, Inc., TFG Acquisition Corp., and Arthur Kronenberg.

ANTHONY DeTORO, New York, New York (Baer Marks & Upham, New York, New York, Eugene R. Scheiman; Zeldes, Needle & Cooper, Bridgeport, Connecticut, David P. Atkins, of counsel), for Defendants-Appellees Andrew Graham, Dennis Williamson, Graham & Williamson, Creative Resources, Inc., TFF, Inc., Apple Leasing, Inc., James T. Pierce, Walter H. Prime and Gordon Locke.

LUMBARD, *Circuit Judge*:

GICC Capital Corporation (Capital) appeals from a September 2, 1993 judgment of the District of Connecticut (Eginton, *J.*), dismissing Capital's amended complaint. The district court adopted a June 15, 1993 report of Magistrate Judge Arthur H. Latimer recommending dismissal of Capital's claims. Capital, a New York corporation with its principal place of business in New York City, sued numerous defendants who allegedly participated in the looting of assets

from defendant Technology Finance Group, Inc. (TFG), a Delaware corporation with its principal place of business in Westport, Connecticut. TFG defaulted on a note that it issued to Capital in settlement of an unrelated litigation. Capital alleges that the note's issuance and the looting of TFG were part of a scheme to defraud Capital by escaping the note and settlement obligations. Capital claims that the scheme violated, among other things, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, 1963. The district court dismissed Capital's RICO claim on the ground that the looting of TFG proximately caused harm only to TFG and not to Capital, and that Capital therefore lacks RICO standing. We reverse.

I.

For purposes of this decision, we take the allegations of the complaint to be true and construe the complaint in Capital's favor. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In March 1990, a principal of Capital settled an unrelated litigation with TFG (to which Capital was not a party) by accepting a promissory note from TFG to Capital for $500,000. The note bore interest of 10% from April 1, 1990 through December 31, 1995. No payments were due until January 1, 1991. Accrued interest of $37,500 was added to the principal on January 1, 1992. From January 1, 1991 to December 31, 1991, only monthly interest of $4,166.57 was due. From January 1, 1992 to December 31, 1995, monthly interest plus principal of $17,343.65 was due at the end of each month. Failure to remit any payment within ten days of a due date, and further failure to cure within fifteen days after receipt of written notice from Capital, entitled Capital to accelerate payment and declare the full amount due and payable.

TFG made the first seven interest payments in 1991 and the interest plus principal payments through November 1992. In December 1992, TFG defaulted and Capital declared the full balance due and payable. TFG did not respond. The amount due stands at $407,021.07, with per diem interest of $110.66 since December 28, 1992. TFG allegedly has no prospect of

making payment, but so far has not filed for, or been placed into, bankruptcy.

TFG's business was in "sale-and-leaseback" transactions that took advantage of certain tax provisions in the 1980s. TFG borrowed funds to purchase office computer equipment, leased the equipment to a user, and directed the user's lease payments to the lender as payment on the loan. At the same time, TFG sold the equipment to an investment trust that leased the equipment back to TFG. The trust investors gained depreciation and other tax benefits.

The user leases lasted as long as the terms of the loans that TFG obtained to purchase the equipment. The trust leases lasted longer. When a user lease expired and the loan had been paid off, the equipment would be leased to a second user. The payments by the second user did not have to be directed to a lender, and thus were available as profits, or "residuals." TFG took a share of the residuals and remitted the balance to the investment trust.

TFG increased its profits by repurchasing trust investors' interests for less than the amount of profits due to flow to the investors. It is unclear why trust investors agreed to this. Capital suggests that TFG advised trust investors that their interests were worth very little. Defendant Dennis Williamson states that the trust investors were given "realistic, but conservative" estimates. At any rate, trust investors' interests were repurchased, and TFG collected all of the payments from the corresponding second user leases.

Defendant Creative Resources, Inc. (CRI), a Nevada corporation with its principal place of business in Westport, Connecticut, is a holding company that conducts business through a group of subsidiaries. CRI was controlled, during the times relevant, by defendants Andrew Graham, Dennis Williamson, Gordon Locke, Walter H. Prime, James T. Pierce, and Graham & Williamson (a partnership of defendants Graham and Williamson).

Until at least 1989, CRI owned TFG through defendant TFF, Inc. (TFF), a DelaWare corporation having its principal place of business in Westport, Connecticut and itself a holding company. TFG owned a subsidiary, defendant Apple Leasing, Inc. (Apple), also a Delaware corporation with its principal place of business in Westport, Connecticut. A straight line of ownership thus existed from CRI to TFG to Apple.

Capital alleges that a series of transactions by the defendants from 1989 to 1991 fraudulently stripped TFG of its assets and inevitably resulted in TFG's default on the note. First, at some time after June 1989, the corporations were reorganized so that Apple became a subsidiary of CRI and not of TFG. The straight line became a triangle. The alienation of Apple deprived TFG of second-user lease payment income to which Apple held rights and from which TFG would have benefitted as Apple's parent.

Second, CRI caused subsequent repurchase transactions to be made by Apple instead of TFG, or to be made by TFG and immediately sold to Apple at no profit to TFG. CRI facilitated the repurchases by loaning the necessary funds to Apple rather than TFG. CRI even caused TFG to act as Apple's collection agent, for no compensation. CRI couched the transfer of residuals as repayment of the intracorporate loans. The result was a stream of profits that flowed through Apple to CRI, bypassing TFG and its creditors. CRI thus used Apple to siphon TFG's business opportunities and leave TFG an empty shell incapable of meeting its obligations. These transfers favored CRI at the expense not just of Capital and other creditors, but of trust investors, who were not paid in some cases. Capital alleges that over $2 million in residuals were thus diverted.

Third, CRI transferred over $1 million of the improperly diverted funds to one of its overseas subsidiaries: TALK Software Ltd. in London. Capital alleges that the purpose of the overseas transfer was to frustrate the collection of TFG's debt.

Fourth, in February 1991, CRI caused TFF to sell the remains of TFG to a new shell company, defendant TFG Acquisition Corp. (TFG Acquisition), a New Jersey corporation with its principal place of business in Newark, New Jersey, for the nominal sum of $10,000. TFG Acquisition is owned by defendant Arthur Kronenberg, who had previously acted as TFG's attorney. As part of the transaction, CRI forgave $1.1 million owed by TFG to CRI, CRI gave TFG rights to $300,000 in residuals, and TFG released CRI from all claims TFG might have had against CRI. TFG's officers and directors resigned. TFG thus was cast adrift without recourse against CRI, CRI's subsidiaries or CRI's controlling persons. CRI, meanwhile, was relieved of the burdens of holding an insolvent subsidiary.

Capital supports its allegations by reference, among other things, to CRI's Securities and Exchange Commission filings which allegedly contain admissions and evidence of the diversions and evidence of the amount diverted and the amount transferred overseas.

In September 1991, Capital filed this suit in the District of Connecticut. The complaint contained claims under federal law for securities fraud and RICO violations, and under state law for fraudulent conveyance and unfair trade practices. Although TFG had not yet defaulted on the note (the default came in December 1992), Capital alleged that defendant TFG was being stripped of its assets by other defendants, and that default was imminent.

In October 1991, defendants filed motions to dismiss the complaint. They asserted that Capital failed to state a federal claim and that the district court should decline jurisdiction over the remaining state law claims. In December 1991, the district court referred the motions to the magistrate judge for report and recommendation. In February 1992, the magistrate judge recommended that the motions be granted because TFG had not yet defaulted on the note and the suit therefore was "premature and speculative." Later that month, Capital filed

objections to the recommendation. Defendants filed oppositions to Capital's objections.

In August 1992 , the district court heard argument on the pending recommendation and objections, and reserved decision. Meanwhile, in December 1992 TFG defaulted on the note. In January 1993, the district court referred the matter back to the magistrate judge for reconsideration.

In March 1993 , Capital filed an amended complaint to allege and add a state law claim for TFG's default. The amended complaint seeks compensatory relief in the amount of the unpaid principal of $407,021.07 under federal securities law and state default and fraudulent conveyance law; actual, treble and punitive damages in the amount of at least $1,500,000 under RICO and state unfair trade practices law; punitive damages of at least $1,000,000; and prejudgment interest, costs and fees.

After a hearing, the magistrate judge in June 1993 recommended that the motions be granted. He reasoned that Capital: (1) failed to state a federal securities claim because the note was not a security; and (2) lacked standing under RICO because the amended complaint's allegations of looting did not describe "specific acts directed at Capital," but only acts directed at TFG with respect to which Capital's harm was "necessarily incidental . . . and derivative" and thus inadequate to establish the proximate cause required for RICO standing. He also recommended that the district court decline jurisdiction over the remaining state law claims.

In July 1993, Capital filed objections to the recommendation. Defendants filed oppositions to Capital's objections. In August 1993, the district court adopted the magistrate judge's recommendation and dismissed the amended complaint.

II.

Capital appeals the dismissal of its RICO claim. It asserts that the district court misread the precedents in concluding that it lacks RICO standing. We agree that Capital has standing, and reverse.

Capital's allegations satisfy the proximate cause requirement for RICO standing. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1316-18 (1992); *First Nationwide Bank v. Gelt Funding Corp.*, No. 93-7422, slip op. 4641, 4654-63 (2d Cir. June 9, 1994); *Hecht v. Commerce Clearing House. Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990). Capital alleges that defendants looted TFG "deliberate[ly] and . . . with the intent to damage [Capital] by impairing TFG's ability to pay its obligations to Capital and to TFG's other general unsecured creditors, rendering TFG insolvent, and in effect subordinating the Capital debt to CRI's purported debts when it should be CRI which is subordinated." Capital alleges that

> [a]t no time during the negotiation of the terms of issuance of the [note] . .
>
> . did . . . defendants ever disclose that, at the same time they were agreeing to cause TFG to issue the [note] . . . they were also stripping TFG of sufficient assets to meet the obligations contained in the [note]. . . . Defendants' failure to disclose their ongoing plan to strip TFG of assets was willful . . . and did cause Capital to accept delivery of the [note] . . . . Had Capital known of defendants' ongoing plan to strip TFG of assets it would not have accepted the [note], at least not without a guarantee from CRI.

Capital further alleges that defendants engaged in a "systematic campaign of looting TFG and fraudulently conveying its assets to CRI, in derogation of the rights of TFG's creditors."

Capital's allegations -- the note's timing (just after the alleged looting began) and magnitude ($500,000) and the rapacious nature of the alleged looting -- fairly posit the directness of injury required for RICO standing. *Cf. First Nationwide*, slip op. at 4657-63. When a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave the creditors unpaid, those creditors have standing. Their injury is "reasonably foreseeable or

anticipated as a natural consequence." *Hecht*, 897 F.2d at 24; *see also Ceribelli v. Elghanayan*, 990 F.2d 62 (2d Cir. 1993): *Stochastic Decisions. Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993); *Standardbred Owners Association v. Roosevelt Raceway Associates. L.P.*, 985 F.2d 102, 104-05 (2d Cir. 1993); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100-01 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

Bankers Trust and *Stochastic* are especially pertinent. The plaintiff in *Bankers Trust* accepted a reorganization plan unaware that the defendant had conveyed assets. The plaintiff in *Stochastic* was a judgment creditor whose collection of the debt was frustrated when the defendants stripped the judgment debtor corporation of its assets. Here, Capital allegedly accepted a litigation settlement unaware that defendants had conveyed assets, and Capital's collection was frustrated when defendants stripped TFG of its assets. Capital's claim is squarely within the compass of our past decisions regarding standing.

Defendants cite our recent decision in *Manson v. Stacescu*, 11 F.3d 1127 (2d Cir. 1993),[3] which states a general rule against creditor standing under RICO, *id.* at 1130, and compares creditors to shareholders based on the ordinarily derivative nature of injury, *id.* at 1131. *Manson* characterized *Bankers Trust* as a "narrow exception" that arose where the creditors were "forced to defend against frivolous lawsuits filed to harass them and to cause them monetary loss over and above that caused by the company's bankruptcy" and where the defendants "had made a fraudulent conveyance for the direct purpose of insulating the corporation from its creditors." *Manson*, 11 F.3d at 1130. *Cf. Wooten v. Loshbough*, 951 F.2d 768, 771 (7th Cir. 1991). Defendants here contend that Capital's injury was indirect because the looting did not specifically target Capital as opposed to other creditors.

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[3] Capital filed a brief as *amicus curiae* in support of the eventually unsuccessful appellants in *Manson*.

We are not persuaded by the citation to *Manson*. The law of RICO standing, as stated in *Bankers Trust*, distinguishes creditors from shareholders whose lack of standing to sue for wrongs to a corporation is recognized "throughout corporate law." *Bankers Trust*, 859 F.2d at 1101. The question remains one of proximate cause, which we find adequately alleged here.

Defendants contend that the appropriate remedy for a general unsecured creditor like Capital is a state court action. They surmise that Capital is in federal court only because of RICO's treble damages provision. The possibility of a state court action, however, does not preclude Capital's standing to pursue federal claims in federal court.

Defendants request that we affirm the decision of the district court even if we resolve the standing issue against them. They assert that Capital fails to allege a pattern of racketeering activity or a relationship among the predicate acts and the enterprise, fails to state a claim under §§ 1962(a), (b) or (c), and fails to plead fraud with particularity. The district court did not address these assertions because it disposed of the RICO claim on the ground of standing. We think it better for these matters to be addressed by the district court in the first instance.

We have considered defendants' remaining arguments and find them to be without merit.

Reversed and remanded for further proceedings consistent with this opinion.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of July, one thousand nine hundred and ninety-four.

Present: HON. J. EDWARD LUMBARD,
HON. ELLSWORTH VAN GRAAFEILAND,
HON. DENNIS G. JACOBS,
Circuit Judges.

GICC CAPITAL CORP.,

Plaintiff-Appellant,

-against-

Docket No.
93-7982

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS WILLIAMSON, GRAHAM & WILLIAMSON, GORDON LOCKE, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, TFG ACQUISITION CORP., and ARTHUR KRONENBERG,

Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this Court with costs to be taxes against the appellees.

GEORGE LANGE III, Clerk
By:

/s/

Edward J. Guardaro
Staff Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GICC CAPITAL CORP.	:	
V.	:	No. 5:91CV00625 (WWE)
TECHNOLOGY FINANCE GROUP, INC., ET AL	:	

RULING ON DEFENDANTS' MOTIONS TO DISMISS

The plaintiff, GICC Capital Corporation, filed this action against defendants Technology Finance Group, Inc. ("TFG, Inc."), Arthur Kronenberg, TFG Acquisition Corporation, Creative Resources, Inc., TFF, Inc., Apple Leasing, Inc., James T. Pierce, Andrew Graham, Dennis Williamson, Graham & Williamson and Gordon Locke in September of 1991 alleging that defendants systematically looted TFG, Inc.'s assets in order to frustrate plaintiffs collection of a promissory note. Plaintiff's Amended Complaint sets forth the defendants' alleged violations in seven counts: Count I - Default on Promissory Note; Count II - Fraudulent Conveyance, Transfer of Apple Leasing, Inc./Transfer of Lease Residuals; Count III - Fraudulent Conveyance, Sale of TFG, Inc.; Count IV - Securities Fraud; Count V - Conspiracy to Commit Securities Fraud; Count VI - Violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a)-(c); and Count VII - Violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a, *et seq*.

In August, 1993, this court adopted Magistrate Judge Arthur H. Latimer's recommended dismissal of the Amended Complaint for failure to present a federal question. It was

determined that plaintiff did not adequately plead a federal securities claim and lacked standing under RICO. Plaintiff appealed the dismissal of its RICO claim. The United States Court of Appeals for the Second Circuit reversed the denial of standing and remanded the case for further proceedings. Defendants seek to dismiss the Amended Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b) (6) for failure to state a RICO claim upon which relief can be granted, and for failure to plead fraud with the particularity required by Fed. R. Civ. P. 9(b).

I. FACTS

The factual history of this litigation has been fully set forth in the June 15, 1993 recommended ruling of former Magistrate Judge Arthur H. Latimer in connection with defendants' motions to dismiss, and in the July 11, 1994 opinion of the United States Court of Appeals for the Second Circuit, familiarity with which is presumed.

II. STANDARD OF REVIEW

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). When determining the validity of a motion to dismiss, the court must accept all well pleaded allegations as true and draw all reasonable inferences in favor of the pleader. *Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d Cir. 1993). "[A] complaint should not be dismissed...unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

The first issue presented is whether plaintiff has adequately pled the essentials of a RICO claim pursuant to 18 U.S.C. § 1962(a)-(c). In order to sufficiently state a claim under RICO a plaintiff must allege a "pattern of racketeering activity." "[T]o prove a pattern of racketeering activity a plaintiff...must

show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Defendants contend that plaintiff has not adequately alleged a "pattern of racketeering activity" because it has failed to satisfy the continuity requirement. The court agrees.

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.... A party...may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id.* at 241, 242. Alternatively, an ongoing enterprise that threatens prolonged criminal activity will satisfy the continuity requirement. While multiple predicates within a single scheme may constitute continuous criminal activity, the continuity requirement is established only if the illegal activities have long-term consequences. *Id.* at 240-42. An enterprise that has a "short lived goal or inherently terminable nature" is not "continuous" for purposes of RICO. *Update Traffic Sys., Inc. v. Gould*, 857 F.Supp. 274, 280-81 (E.D.N.Y. 1994).

This case involves an alleged scheme to defraud a single company out of monies due on a note. While plaintiff contends that defendants committed fraudulent acts against "TFG, Inc.'s creditors" and "trust investors", the Amended Complaint fails to identify with the requisite specificity the persons or entities, other than plaintiff, that were defrauded by defendants. Plaintiff's attempt to plead "multiple victims" does not meet the requirement of Fed. R. Civ. P. 9(b) that averments of fraud be stated with particularity. *See Menasco. Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989) (allegations that defendant committed fraud against plaintiffs and "various individuals" lacked necessary specificity to allow a finding of continuity based on multiple victim theory). Consequently, plaintiff's multiple victim allegations cannot be relied upon to show continuing racketeering activity.

Even if the court assumes that plaintiff properly alleges, to the requisite specificity required by Fed. R. Civ. P. 9(b), a fraudulent plan to loot TFG, Inc. in order to frustrate plaintiff's satisfaction of the note, there can be no finding of continuity. Such a single short-lived scheme does not denote continuous racketeering activity. Once defendants' narrowly focused goal was accomplished, i.e., when the remnant of TFG, Inc. was sold to TFG Acquisition Corporation without recourse, defendants' racketeering activity ended. Defendants' alleged illegal activities do not suggest "a distinct threat of long term racketeering activity, either implicit or explicit. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. at 242.

Furthermore, defendants' alleged fraudulent scheme does not meet the "closed-ended" variety of continuous conduct just because it spanned, at most, a two year period. While the alleged looting scheme necessitated a number of predicate acts over a determinate period of time, its short-lived goal and inherently terminable nature preclude a finding of continuity. *See Mead v. Schaub*, 757 F.Supp. 319 (S.D.N.Y. 1991) (employers alleged scheme to appropriate management consultant's client base over a period of years did not meet continuity requirement); *Terry A. Lambert Plumbing Inc. v. Western Sec. Bank*, 934 F.2d 976 (8th Cir. 1991) (alleged banking scheme to defraud contractor via deceptive loan default practices did not meet continuity requirement).

Defendants' alleged pillaging of TFG, Inc. does not constitute unlawful activity "whose scope and persistence pose a special threat to social well-being." *Int'l Data Bank. Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir., 1987). The court agrees with the Fourth Circuit's statement in *Menasco. Inc. v. Wasserman*, 886 F.2d at 685 (citations omitted):

> If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim. If we were to recognize a RICO claim based on the narrow fraud alleged here, the pattern requirement would be rendered meaningless.

Consequently, plaintiff has failed to adequately plead a "pattern of racketeering activity" pursuant to 18 U.S.C. § 1962, *et al.*

CONCLUSION

Plaintiff's securities fraud claims having been dismissed in an earlier opinion, its RICO claim is the sole basis for federal jurisdiction. The remainder of plaintiff's claims plead relief under state law and will not be adjudicated by this court.

For the foregoing reasons, the defendants' motions to dismiss [88] and [90] are GRANTED.

Dated this 21st day of December, 1994, at Bridgeport, Connecticut.

/s/

WARREN W. EGINTON
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GICC CAPITAL CORP.

v. CIVIL NO. 5:91CV0625 (WWE)

TECHNOLOGY FINANCE GROUP, INC., et al

J U D G M E N T

This cause came on for consideration defendants' motion to dismiss before the Honorable Warren W. Eginton, Senior United States District Judge, and

The Court having considered the motions and all the papers submitted in connection therewith filed its Ruling on Defendants' Motions to Dismiss granting the motions,

It is therefore **ORDERED** and **ADJUDGED** that judgment be and is hereby entered in favor of the defendants and the action is dismissed, in accordance with the Court's ruling.

Dated at Bridgeport, Connecticut this 28th day of December, 1994.

KEVIN F. ROWE, Clerk

By /s/

Carol E. Cannady
Deputy in Charge

STATUTORY PROVISIONS INVOLVED

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means . . .

(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . .;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity . . . .

§ 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful of any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

§ 1964. Civil remedies

. . .

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee.

18 U.S.C. §§ 1961, 1962, 1964 (1970), *as amended.*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GICC CAPITAL CORP.,	:	
Plaintiff,	:	5:91CV00625(WWE)
-against-	:	
TECHNOLOGY FINANCE ANDREW GRAHAM, DENNIS WILLIAMSON, GRAHAM & WILLIAMSON, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, GORDON LOCKE, TFF, INC., APPLE LEASING INC., TFG ACQUISITION CORP. AND ARTHUR KRONENBERG,	:	**AMENDED COMPLAINT**
Defendants.	:	

Plaintiff GICC Capital Corp. ("GICC"), by its attorneys, Reid & Priest, for its complaint alleges as follows:

PARTIES

1. Plaintiff GICC Capital Corp. is a corporation organized under the laws of the State of New York with its principal offices at 110 East 59th Street, New York, New York.

2. Upon information and belief, defendant Technology Finance Group, Inc. ("TFG") is or was a corporation organized under the laws of the State of Delaware with its principal offices at 49 Richmondville Avenue, Westport, Connecticut.

3. Upon information and belief, defendant Andrew Graham is a foreign national who was or is a senior executive officer of TFG and certain of the other corporate defendants, as

well as a partner in the defendant Graham & Williamson. He was, upon information and belief, intimately involved in each of the transactions complained of herein. Upon information and belief, he has returned to England to reside permanently.

4. Upon information and belief, defendant Dennis Williamson is a resident of the State of Connecticut who also was or is a senior executive officer of TFG and certain of the other corporate defendants, as well as a partner in the defendant Graham & Williamson. He was, upon information and belief, intimately involved in each of the transactions complained of herein.

5. Upon information and belief, defendant Graham & Williamson ("Graham & Williamson") is a Connecticut general partnership with its principal place of business at 468 Post Road East, Westport, Connecticut. Its general partners are, upon information and belief, the defendants Andrew Graham and Dennis Williamson. Graham & Williamson is a substantial shareholder in CRI.

6. Upon information and belief, defendant Gordon Locke was a director of and the Executive Vice-President of TFG and/or CRI and is a resident of the State of New York. He also was, upon information and belief, intimately involved in each of the transactions complained of herein. Upon information and relief, Locke resigned as a director of CRI on May 31, 1991.

7. Upon information and belief, defendant Creative Resources, Inc. ("CRI") is a corporation organized under the laws of the State of Nevada with its principal place of business at 468 Post Road East, Westport, Connecticut. CRI is the parent company of TFF and Apple, and was, indirectly through TFF, the parent company of TFG. As is set forth in greater detail below, CRI was the company to which the proceeds of certain fraudulent conveyance transactions were funnelled.

8. Upon information and belief, defendant TFF, Inc. ("TFF") is a corporation organized under the laws of the State

of Delaware with its principal offices at 468 Post Road East, Westport, Connecticut. TFF is a wholly-owned subsidiary of CRI, and as is set forth in greater detail below, it literally gave away the shares in TFG which it held after CRI had stripped TFG of its assets.

9. Upon information and belief, defendant Apple Leasing, Inc. ("Apple Leasing" or "Apple") is a corporation organized under the laws of the State of Delaware with its principal place of business at 468 Post Road East, Westport, Connecticut. Apple Leasing is also a subsidiary of CRI. At one time it was a subsidiary of TFG, but as is set forth below the defendants (other than TFF, TFG Acquisition and Arthur Kronenberg) transferred the shares of Apple from TFG to CRI for no consideration. As is set forth in greater detail below, Apple Leasing was a vehicle through which monies belonging to TFG were funnelled to CRI.

10. Upon information and belief, defendant James T. Pierce ("Pierce") is a director of CRI and is a resident of the State of Maryland. He also was, upon information and belief, involved with the fraudulent transactions described herein.

11. Upon information and belief, defendant Walter H. Prime is a foreign national who was an Executive Vice President and a director of CRI. Upon information and belief, Prime was involved with the fraudulent transactions described herein.

12. Upon information and belief, defendant TFG Acquisition Corp. ("TFG Acquisition") is a corporation under the laws of New Jersey with its principal place of business at 60 Park Place, Newark, New Jersey. TFG Acquisition acquired CRI's and TFF's shares in TFG, for no consideration, and, upon information and belief, is a shell entity with little or no assets.

13. Upon information and belief, defendant Arthur Kronenberg owns 100% of the outstanding stock of TFG Acquisition, and he is the president of TFG. As is set forth in greater detail below, Kronenberg was at one time an attorney

for TFG, and he recently acquired TFG from CRI and TFF for no consideration, in a transaction which plaintiff believes was a fraudulent conveyance and which plaintiff believes was designed to insulate CRI from previous fraudulent conveyances.

JURISDICTION AND VENUE

14. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 (federal question), 15 U.S.C. § 78aa (Section 27 of the Securities Exchange Act of 1934) and 18 U.S.C. § 1964(c) (RICO).

15. Venue lies in the District of Connecticut pursuant to 28 U.S.C. § 1391, in that the claims alleged herein arose in the District of Connecticut, 15 U.S.C. § 78aa, in that the defendants are found, inhabit and/or transact business in the District of Connecticut, and 18 U.S.C. § 1965(a), in that the defendants reside, are found, have agents and/or transact their affairs in the District of Connecticut.

JURY DEMAND

16. Plaintiff demands trial by jury in this action.

NATURE OF CLAIMS

The Business of TFG

17. The defendant TFG was and is in the business of the leasing of data processing equipment. Its business works essentially as follows. TFG purchases a piece of computer equipment, such as an IBM 3090 mainframe computer. It borrows funds to make the purchase and it then leases the IBM computer to an initial end-user for a specified time, such as 60 months. TFG then amortizes the debt over the period of the term of the end-user lease, by directing end-user rental payments to the lender.

18. TFG then typically sold the IBM computer, in a sale-and-leaseback transaction, directly or indirectly to an investor, such as a trust. This sale-and-leaseback is subject to the initial end-user lease, which in effect becomes a sub-lease. By purchasing the equipment and then leasing it back to TFG, the

trust investor receives depreciation and other tax benefits. This lease is for a longer period than the initial end-user lease. For example, if the initial end-user lease is for 60 months, as in the example above, then the investor's lease might be for a period of 84 months.

19. When the initial end-user lease ends, TFG then typically remarkets the computer equipment, until the end of the investor's lease term. In the example referred to above, this remarketing would take place between months 60 and 84 of the investor lease. TFG collects the remarketing lease rentals (also called "residuals"), keeps an agreed-upon percentage as a fee, and is supposed to remit the balance to the investor.

20. Thus, as TFG collects lease residuals during the period from the end of the initial end-user lease to the end of the investor's lease, TFG is supposed to split the proceeds from those residuals with the equipment investors. A typical split is 65% to the investor, and 35% to TFG. From time to time, TFG and/or CRI have repurchased investor units from the various equipment trusts, which enables TFG to keep a large effective percentage of the residuals since TFG then owns the investor's interest and does not have to pay him.

21. This kind of sale-and-leaseback transaction for computer equipment was popular in the late 1970s and early 1980s. However, since the Tax Reform Act of 1986, these transactions have diminished in volume. However, many leases from the late 1970s and early 1980s are now in the remarketing phase (after the term of the initial end-user lease), and remarketing rent monies ("residuals") are flowing into TFG.

CRI Appears on the Scene

22. In January of 1989, CRI, through its subsidiary TFF, acquired 100% of the stock of TFG. CRI, a public company, previously had no assets other than cash, and today it is only a shell holding company which holds stock in various subsidiaries, including TFF and Apple Leasing, as well as four foreign subsidiaries. Graham, Williamson, the Graham & Williamson

partnership and Locke together own a majority of CRI's common stock. In June of 1989 Williamson became the President of CRI, and Graham and Locke became Executive Vice Presidents. Together they also constituted 75% of CRI'S board of directors, which also included defendants Pierce and Prime. Upon information and belief, CRI removed Locke as Executive-Vice President in 1991, and Locke resigned as a director of CRI on May 31, 1991.

23. Shortly after they acquired control of CRI, and its subsidiary TFG, as is set forth in greater detail below, these defendants began to engage in a systematic campaign of looting TFG and fraudulently conveying its assets to CRI, in derogation of the rights of TFG's creditors.

24. The net effect of this looting has been to leave TFG without any assets, and, in effect, insolvent, and therefore unable to repay its obligations to GICC pursuant to a promissory note between TFG and GICC.

TFG's Default on The GICC Note

25. TFG entered into a Stipulation of Settlement with, among others, Klondike Resources, Inc., The Leasing Equipment Group, Inc., Joel Mallin, and Equitable Leasing Co., Inc. on March 29, 1990.

26. As part of the settlement, TFG delivered a promissory note payable to GICC in the amount of $500,000 (the "GICC Note", which is annexed as Exhibit A). The GICC Note provided for interest at the rate of 10% per annum from April 1, 1990 until the date the GICC Note is paid in full.

27. In connection with the settlement agreement pursuant to which the GICC Note was issued, CRI also issued 250,000 shares of common stock to a shareholder and a business associate of GICC.

28. Under the terms of the GICC Note, TFG was to pay interest on the principal balance from January 1, 1991 until December 31, 1991. The monthly payment was to be $4,166.57.

29. From January 1, 1992 until December 31, 1995, TFG was to pay interest and principal on the GICC Note on a monthly basis, totaling $17,343.65 each month.

30. Pursuant to Paragraph 4 of the GICC Note, TFG's failure to remit any payment of principal or interest within ten days after the note's due date and TFG's further failure to cure such default within fifteen days after receipt of written notice from GICC authorized GICC to accelerate payment of the GICC Note and declare the full unpaid balance immediately due and payable.

31. TFG made its first seven interest payments in 1991 and monthly payments of principal and interest through November of 1992. However, TFG failed to remit payments on a timely basis and only upon notice and demand of payment by GICC.

32. In fact, on or about December 1, 1992, TFG formally defaulted on its payment of the GICC Note, thus entitling GICC to forward a notice of default to TFG which GICC did on December 10, 1992. This notice declared the entire balance of the GICC Note immediately due and payable. Further GICC subsequently forwarded a formal demand letter to TFG on December 28, 1992, by facsimile and by certified mail, return receipt requested. (Copies of these letters are annexed hereto as Exhibit B).

33. No payment has been made by TFG in response to GICC's notice of default or its demand letter.

34. As a result, there is now due and owing to GICC the sum of $407,021.07 with per diem interest at $110.66 from December 28, 1992.

35. In addition to this default, because of CRI's fraudulent transfers, as alleged in paragraphs 36-56 below, TFG is unable to meet its remaining payment obligations on the GICC Note.

Defendants Have Defrauded TFG's Creditors, Including GICC, and Its Trust And Individual Investors

36. The systematic looting of TFG by defendants Graham, Williamson, Locke, CRI and its subsidiaries and affiliates, and completed with the approval of CRI directors Pierce and Prime, and which resulted in TFG becoming insolvent, began with the collection of TFG's lease residuals on behalf of the investors, which were then fraudulently transferred to Apple Leasing or to CRI for little or no consideration. The manner in which these transactions were accomplished is quite complex, but they may be summarized as follows.

a. *The Transfer of Apply [sic] Leasing to CRI*

37. A first way in which CRI is able to loot TFG, and to cause it to be insolvent, involves Apple Leasing. Upon information and belief, at some time since June, 1989 CRI acquired several companies, including Apple Leasing. Prior to that time, Apple Leasing had been a subsidiary of TFG, and the defendants Graham, Williamson and Locke caused Apple Leasing to be transferred from TFG to CRI for no consideration. These defendants, with the knowing participation of directors Pierce and Prime, caused Apple Leasing to be transferred to CRI at a time when Apple Leasing had significant assets (derived primarily from TFG's equipment residuals), and TFG had incurred significant liabilities, including liabilities to banks, trade vendors, investors and to plaintiff.

38. While this transaction had no net effect on CRI's consolidated financial position, it deprived TFG's creditors of the Apple Leasing subsidiary as a solvent entity that they could look to for payment of their claims, and it reduced TFG's assets and caused TFG's current liabilities to exceed its remaining assets, thereby rendering TFG insolvent.

b. *The Transfer of Repurchased Investor Interests to CRI*

39. A second way in which CRI is able to loot TFG also involves using Apple Leasing as a conduit for funds from

TFG to be funnelled to CRI, in further derogation of the rights of TFG's creditors. TFG in many instances had the opportunity to purchase investor interests, and would advise the investor, by mail, and/or then by telephone, that investor's interests were worth very little. If the investor agreed to sell his interest, then TFG would mail a check, or wire transfer funds, to that investor. Thus, TFG made these purchases cheaply and it would profit to the extent remarketing proceeds from computer equipment exceeded the purchase price from the investor's interest in the equipment.

40. Graham, Williamson and Locke, with the knowing participation of directors Pierce and Prime, then caused TFG to sell the interest to Apple Leasing for TFG's purchase price, resulting in the diversion of the profit from TFG to Apple Leasing and to CRI.

41. In other instances, TFG caused Apple Leasing to purchase the investor's interests directly, by use of the mails and by wire, at a low price, diverting corporate opportunity from TFG to Apple Leasing and to CRI for no consideration, thereby further reducing TFG's assets.

42. Further, Apple Leasing caused TFG to collect these lease residuals as Apple's agent, without compensation, and caused TFG purportedly to remit those monies on Apple's behalf to CRI, which was also in derogation of the rights of TFG's creditors.

c. *The Transfer of TFG Lease Residuals To CRI To Discharge Intercorporate Debt*

43. Upon information and belief, Apple Leasing has transferred the TFG lease residuals to CRI purportedly to discharge alleged intercorporate debts from Apple to CRI, or from Apple to TFG, or from TFG to CRI.

44. Thus, as disclosed in CRI's Form 10-K for the year ending March 31, 1990, after it was transferred from TFG to CRI, Apple Leasing purchased computer residuals and entered into lease transactions from which it received lease payments, or had TFG collect the lease residuals, which were

then at times paid over to CRI. This 10-K filing, which was signed by defendants Graham, Williamson, Locke and Pierce, is described in greater detail in paragraphs 60-63 below.

45. These transactions caused CRI to be "re-paid" for alleged intercorporate obligations owed to it on a preferred basis, when at the very least CRI's claims should have been subordinated. There was no excuse for CRI to use its subsidiaries, Apple Leasing and TFG, to enable itself to be re-paid on such a preferred basis, where any "debts" owed by TFG or Apple to CRI should be subordinated to claims of general creditors of these entities. CRI may not cause its debts to be re-paid in such a preferential manner.

d. *Two Examples of the Fraud*

46. Two investor trusts which illustrate the manner in which these fraudulent transactions were accomplished are the so-called CPL and SCB trusts. In the case of CPL, for example, during 1990 TFG was repurchasing 12 of the 13 outstanding investor interests, at a time when there was a lease residual apparently due in July of 1990, on the IBM 3090 computer which was involved there, of $745,000. The investor interests were repurchased by both TFG and Apple. The total consideration paid to the 12 repurchased investor interests appears to have been only $83,000. Upon information and belief, Apple received $344,000 of the $745,000 residual payment, and the balance appears to have been paid to defendants or their affiliates.

47. In the case of SCB, approximately $800,000 was realized on the re-marketing of several different pieces of computer equipment to several different end users. Here too there were 13 trust units, of which 12 were re-purchased for a total of $4,200 cash, $3,150 in notes and $2,936.50 in stock -- or approximately $790,000 less than was actually realized. This profit was diverted to CRI and Apple or their affiliates.

48. Thus, on these two transactions above, CRI and Apple realized approximately $1,500,000 in benefits to themselves. These profits were diverted from TFG, and left the company

insolvent. These two transactions alone played a substantial role in making TFG insolvent. The transactions constituted a fraud on TFG's creditors. A computer print-out evidencing these transactions is annexed hereto as Exhibit C.

49. Based on these transactions, lease residual proceeds are funneled from TFG to CRI, in some instances through Apple Leasing, in purported discharge of obligations owed to CRI, which had the effect of leaving TFG insolvent, and unable to pay its creditors, including GICC. In addition to constituting transfers of assets for no consideration or for insufficient consideration, these transactions also resulted in the diversion of corporate and business opportunities and profits from TFG to CRI.

e. *Failure To Pay Over To Investors Their Share of TFG Lease Residuals*

50. Finally, in some instances TFG simply failed to pay over to investors their share of the residuals collected by TFG from the remarketing of computer equipment. As remarketing residual proceeds are paid to TFG, TFG is supposed to keep a certain percentage (usually 35%) as a fee, and is supposed to remit the balance to the equipment investors. Instead, in many instances TFG is simply paying the investors' share of those moneys over to CRI directly, either through the mails or by wire transfer, in purported satisfaction of intercorporate debts allegedly owed by TFG to CRI. In this fashion CRI obtains funds from TFG which otherwise would have been available to pay to TFG's equipment investors, or to TFG's other creditors.

51. Further, by failing to remit to investors their share of lease remarketing proceeds, TFG and CRI are compounding the problems faced by TFG's other unsecured creditors who may face an increased level of claims against a diminished pool of assets -- a pool of assets diminished by the funneling of funds to TFG's parent, CRI.

52. The net effect of this fraud on TFG's creditors has been the diversion and funneling by CRI of more than

$2 million in cash into CRI. As a result, TFG has been left insolvent and TFG's creditors have been left without adequate sources of repayment. The transfers have left TFG with virtually no cash since all or almost all of its cash was funneled to Apple Leasing and then to CRI, or to CRI directly, and TFG's liabilities substantially exceed its assets.

f. *Transfer of Assets Out of the Country*

53. Upon information and belief, proceeds in excess of $1 million from the transactions referred to above have been transferred to another CRI subsidiary, TALK Software Limited (f/k/a/ CCR Software Ltd.), which is located in London. Upon information and belief, defendant Graham has returned to London. Thus, while these funds are still in CRI on a consolidated financial reporting basis, it appears that defendants may be acting to make it more difficult to recover those proceeds for the benefit of GICC and TFG's other unsecured creditors by moving the proceeds offshore. At the same time that it has transferred monies out of the country, CRI "discontinued" the operations of Apple Leasing, as reported in a July, 1991 10-K filed with the SEC. (See Ex. E at p. 5).

TFF Sells TFG to a Company Owned by Arthur Kronenberg

54. In order to make it that much more difficult for TFG's creditors to recover from TFG, CRI's shell subsidiary, TFF, with the approval of CRI's directors, sold TFG to another company with no assets. TFF sold the stock in TFG which TFF held to TFG Acquisition, a shell company owned by a New Jersey lawyer, Arthur Kronenberg. Kronenberg had previously rendered legal services to TFG. Kronenberg's worthless entity, TFG Acquisition, purchased TFG for virtually nothing.

55. Thus, on February 5, 1991 CRI announced the sale of its subsidiary TFG for a "nominal consideration" to a

company owned by Arthur Kronenberg. (A copy of CRI's Press Release announcing the sale is annexed as Exhibit D).

56. Upon information and belief, the purpose of this transaction was to strip away TFG from CRI and to give away TFG so that (i) CRI did not have to report an insolvent subsidiary as a part of its consolidated financial statement; (ii) TFG could go bankrupt without having a direct impact on CRI; and (iii) making it that much more difficult for TFG's creditors to recover against TFG. Thus, having stripped TFG clean, the defendants set it adrift, and even caused TFG to give to CRI a non-arms length release.

SEC Filings

57. Defendants' fraudulent scheme is actually set forth in CRI's public filings with the SEC, albeit in a fashion which is almost impossible to understand.

58. In a July, 1991 10-K filed with the SEC, annexed as Exhibit E, CRI states in its consolidated balance sheets, that it had $1,846,000 in cash as of March 31, 1991, an increase of more than $1.3 million from March 31, 1990.

59. Upon information and belief, this sizable increase in cash is due in large part to TFG lease residuals which were funneled through Apple Leasing, and then on to CRI, and from TFG residuals which were also transferred to CRI directly.

60. Further, in its Form 10-K for the year ended March 31, 1990, which was not filed with the SEC until December 4, 1990, in a section titled "Future Outlook", CRI also stated that:

> The Company is presently meeting its working capital requirements (i) from collections by the Company from its lease portfolio, the Company borrowing funds from and deferring payment to limited partnerships managed by TFG's subsidiary, with the

> Company using these funds to pay for its operations and to repay its obligations to CRI.*

61. Upon close examination, this almost impenetrable prose reveals the defendants' looting and fraud. First, CRI stated that it is meeting its "working capital requirements from (i) collections by the Company from its lease portfolio." This means, upon information and belief, that CRI, and its subsidiary TFG, are taking lease residuals collected by TFG (on behalf of TFG's investors) and then transferring those monies either to Apple Leasing and then on to CRI, or to CRI directly, keeping those lease residuals as CRI's own and using those residuals for CRI's operating expenses rather than paying the residuals over to investors or using them to pay claims against TFG.

62. In addition, when CRI states that it is "borrowing funds from and deferring payment to limited partnerships managed by TFG's subsidiary," CRI is admitting that it is taking monies from lease residuals from TFG and Apple Leasing and not paying those monies to investors. And when CRI says it is "borrowing funds from and deferring payment to limited partnerships," that is a direct admission that CRI is taking monies from and not paying monies to investors who are entitled to them. Further, CRI is also acknowledging that it has not paid back those entities and has no plans to pay back those entities until some unknown time in the future -- really never to be paid back.

63. CRI then states that "the Company [is] using these funds to pay for its operations and to repay its obligations to CRI." This means that CRI takes the cash from TFG and Apple Leasing purportedly in exchange for the discharge of intercorporate debt owed to CRI. CRI fails to disclose that these arrangements have left TFG insolvent, with few if any assets

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* In its Form 10-K, CRI defines "the Company" as including "CRI, its subsidiaries and all affiliates of subsidiaries including ... Apple Leasing, Inc. ("Apple") and TFF and its consolidated subsidiary, TFG." (The Form 10-K for the year ending March 30, 1990 is annexed as Exhibit F, at p. 6).

to pay off its substantial remaining liabilities, and also leaves (i) TFG's creditors in a vulnerable position, and (ii) CRI in a preferred repayment position.

64. Upon information and belief, the insolvency of TFG, caused by the fraudulent transfer of assets, led CRI's certified public accountants, BDO Seidman, to issue a qualified opinion letter, dated September 7, 1990, in connection with the 1990 10-K. (See Ex. F). In its opinion letter, BDO Seidman expressed doubts about CRI's going concern capability, and stated: "Such conditions [CRI's liabilities] raise substantial doubt about the Company's ability to continue as a going concern." In its opinion letter in the July, 1991 10-K, BDO Seidman removed this qualification, and, upon information and belief, did so solely because the insolvent TFG had been removed from CRI's books.

65. CRI also restated part of this fraudulent scheme in another document recently filed with the SEC, which announced the sale of TFG to TFG Acquisition. In its Form 10-Q, annexed as Exhibit G, filed with the SEC on February 14, 1991, CRI stated:

> On February 1, 1991, a subsidiary of the Registrant, TFF, Inc. ("TFF") sold all of the Common and Series A Preferred stock of its wholly-owned subsidiary, Technology Finance Group, Inc. ("TFG") to TFG Acquisition Corp., a newly organized corporation owned by Arthur Kronenberg, Esq., an unrelated party. TFG is engaged primarily in the leasing of data processing equipment. TFG paid for the equipment with proceeds of non-recourse loans and the equipment was generally sold to equipment investors as part of sale and lease-back transactions. Although TFG was continuing to remarket the equipment from past transactions it was not entering into new transactions of the same type. Therefore, the assets of TFG primarily consisted of (i) the right to receive lease payments in the future against which TFG was obligated to pay certain of these payments to the investor

owners and (ii) certain contractual rights to remarket the equipment at the end of their existing leases.

TFF received a nominal cash consideration for the shares of TFG. In determining the amount of the consideration to be received, representatives of TFG negotiated with other persons as to what they would pay for the stock of TFG, taking into consideration the assets and corresponding liabilities of TFG. The only other interest shown involved terms which the Registrant deemed less advantageous to it.

* * *

The Registrant purchased certain furniture and fixtures of TFG concurrently with the sale, for an amount equal to the consideration paid by the purchaser for the shares of TFG. *Additionally, the Registrant released TFG from certain obligations of TFG to the Registrant, in exchange for a cash payment and an assignment of Registrant's interest in certain computer residuals, TFG released the Registrant from any and all claims that TFG might have against the Registrant.* (emphasis added).

66. The last paragraph of the 10-Q is crucial to understanding the fraudulent scheme. CRI, the "Registrant", released TFG from "certain obligations" of TFG to CRI (i.e., the debt exchanged when TFG transferred TFG lease residuals to CRI). CRI received cash (in an undisclosed amount) and made an assignment of CRI's "interest in certain computer residuals." CRI thus admitted in the 10-Q that it was collecting the TFG lease residuals -- which should be paid first to TFG's investors -- and purportedly obtained a release from TFG for any claims TFG may have against CRI.

67. In its July 1991 10-K for the year ending March 30, 1991, filed on July 15, 1991, CRI announced that it has "discontinued" the operations of Apple Leasing, and changed the name of CCR Software Limited to "TALK Software Limited," an English company. (See Ex. E at p. 5).

68. In its typically vague manner, CRI described the residue of the fraudulent scheme.

69. First, in its consolidated balance sheet, CRI states that it has $1,846,000 in cash as of March 31, 1991, which was an increase of almost $300,000 from December 31, 1990, and an increase of more than *$1.3 million* from March 31, 1990. (See Ex. E at p. 27).

70. In its description of its business, CRI stated:

> Domestic activities were, until recently, focused on: (i) Apple which engaged in purchasing computer residuals for cash where it anticipated realizing profits from the resale of the purchased equipment within twelve months of purchase; (ii) Columbia which engaged in originating leases for dry cleaning equipment; and (iii) TFG which managed a portfolio of computer leases. TFG was sold in February 1991 at which time Columbia and Apple also ceased developing new business.

(Ex. E at p. 6) (emphasis added).

71. In the section titled "Operating Results," CRI admitted that its "large percentage increase" in company income "resulted from the Company's increased interest income from cash balances." (Ex. E at p. 11). These "cash balances" are, of course, the monies transferred to CRI from Apple Leasing and/or TFG. There is no other plausible explanation for the large cash balances since CRI admits in this 10-K that the Company's "present continuing business, which began April 1, 1990, is considered a *new line of business* and its *revenues*, costs and expenses, are not comparable to any prior period," and this "new" line of business is "still in its formative stage." (Ex. E at p. 11) (emphasis added).

72. CRI further admitted in the 1991 10-K that the fraudulent scheme had taken place in a section titled "Liquidity and Future Outlook." (Ex. E at p. 12). In this section, CRI states in language nearly identical to the 1990 10-K:

> The Company is presently meeting its working capital requirements from (i) *collections by the Company's Apple* and Columbia subsidiaries (discontinued operations) *from their lease portfolios* (these should be considered diminishing assets and opportunities) and (ii) its cash balances.

Ex. E at p. 12. (emphasis added).

73. In CRI's Form 10-Q for the quarter ended June 30, 1991, it is clear that CRI has sent its monies abroad. (The Form 10-Q for the quarter ending June 30, 1991 is annexed as Exhibit H).

74. First, on its consolidated Balance Sheets, under the "Current Assets" column, CRI's "Cash and Cash Equivalents" has declined by almost $300,000 from March 31, 1991 to June 30, 1991, from $1,846,000 to $1,584,000. Since CRI has no active operations in the United States according to their publicly filed documents, the only explanation is that this cash has been sent abroad to CRI's foreign subsidiaries.

75. As further evidence of this shift in cash abroad, under the column titled "Stockholders' Equity" on page 3 of the Consolidated Balance Sheets, there is an entry for "Translation Gain." CRI reports an increase of $49,000 in Translation Gain from March 31, 1991 to June 30, 1991 (from $7,000 to $56,000). Upon information and belief, "Translation Gain" refers to the value of the dollar as against other currencies (like the British pound). CRI is thus reporting a profit of $49,000 in the second quarter for the value of its foreign currency holdings since the dollar has declined in value during that period. Clearly, CRI would not report any "Translation Gain" if all of its cash was still being kept in the United States. The only reasonable explanation is that CRI has funneled its monies abroad.

76. Therefore, from the descriptions in the 1991 10-K and the latest 10-Q, it is clear that CRI has collected the lease residuals from its Apple and TFG subsidiaries, which resulted in a large infusion of cash balances, has discontinued the

operations of its American subsidiaries, and has shifted its operating activities outside the United States. Since CRI no longer has active operations in this country, it is very likely that CRI has sent, and will send, its large cash balances out of the country. This is especially likely since defendants Graham and Prime reside in England, and CRI's main subsidiary, TALK Software, is also based in England. Clearly, GICC, and TFG's other creditors, will not have any recourse once CRI completes its fraudulent scheme to transfer its assets out of the country, after having stripped TFG of its assets and rendering TFG insolvent.

Requests for Information

77. On February 19, 1991, Joel Mallin, counsel to GICC, who did not yet know about the sale of TFG, wrote to defendant Locke, Executive Vice-President of TFG, and requested financial information about the buyer of TFG, as well as assurances that the buyer would assume TFG's obligations under the GICC Note. (The letter from Joel Mallin to Gordon Locke, dated February 19, 1991, is annexed as Exhibit I).

78. On February 27, 1991, defendant Locke, who is also on the Board of Directors of CRI, replied to Mallin. He stated that he is "no longer an Executive Vice President of Technology Finance Group, Inc. . . ." and enclosed a copy of the press release announcing the sale of TFG. (The letter from Gordon Locke to Joel Mallin, dated February 27, 1991, is annexed as Exhibit J.)

79. TFG Acquisition did not assume any of the liabilities of TFG or any other entity. On March 5, 1991, Arthur Kronenberg sent a letter to Richard Swanson, an attorney representing GICC, that, in connection with the sale of TFG, "[n]o assumption of liabilities was made. TFG was acquired along with whatever liabilities it had." (Letter from Arthur Kronenberg to Richard Swanson dated March 5, 1991, is annexed as Exhibit K).

80. Since TFG Acquisition did not assume the liabilities of TFG or anyone else, and, upon information and belief, is a

shell corporation, it will not -- and cannot -- discharge the obligations of TFG to GICC.

81. Each of the defendants was involved in the fraudulent conveyances set forth above.

(a) TFG is liable on the GICC Note and was involved in the fraudulent transfer of its lease residuals and the fraudulent transfer of its stock;

(b) CRI and TFF, like TFG, were involved in the fraudulent transfer of lease residuals and the fraudulent transfer of stock in TFG;

(c) Apple Leasing was involved in the fraudulent transfer of lease residuals;

(d) TFG Acquisition was involved in the fraudulent transfer of TFG stock;

(e) Graham & Williamson is a partnership which is a major controlling shareholder of CRI and, upon information and belief, Graham & Williamson and its agents and partners were directly involved in each of the transactions complained of herein;

(f) Andrew Graham and Dennis Williamson were or are senior executive officers, directors and/or stockholders of TFG, CRI and Apple and are the partners of the Graham & Williamson partnership;

(g) Gordon Locke is an officer, director and stockholder of CRI and, prior to its sale to TFG Acquisition, was also an officer and a principal of TFG who, upon information and belief, was directly and personally involved in each of the transactions complained of herein; and

(h) James T. Pierce and Walter H. Prime were and are officers, directors, and shareholders of CRI, and, upon information and belief, approved of the fraudulent transactions described herein.

FIRST CAUSE OF ACTION

(Default on a Promissory Note -- Against TFG)

82. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 81 as if fully set forth herein.

83. The non-payment of the GICC Note by TFG, as described above, constitutes a default on the part of TFG.

84. By virtue of this default, there is now due and owing to GICC the amount of $407,021.07, with per diem interest of $110.66 from December 28, 1992.

SECOND CAUSE OF ACTION

(Fraudulent Conveyance -- Against All Defendants Except TFG Acquisition and Arthur Kronenberg -- Transfer of Apple and Lease Residuals)

85. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 84 as if fully set forth herein.

86. The transfers of lease residuals by TFG and Apple Leasing to CRI, described above, constitute a fraudulent transfer by all the defendants as to GICC. Defendants' conduct was deliberate and made with the intent to damage plaintiff by impairing TFG's ability to pay its obligations to GICC and to TFG's other general unsecured creditors, rendering TFG insolvent, and in effect subordinating the GICC debt to CRI's purported debts when it should be CRI which is subordinated. All defendants except TFG Acquisition and Arthur Kronenberg knowingly participated in these fraudulent transactions.

87. The transfer of Apple Leasing from TFG to CRI for no consideration, which was approved by the directors of CRI, also constituted a fraudulent conveyance as to GICC, since GICC could no longer look to Apple Leasing to discharge the obligations contained in the GICC Note.

88. By virtue of the fraud, looting and deceit by all defendants, except TFG Acquisition and Arthur Kronenberg, plaintiff has been damaged by an amount of at least $407,021.07, exclusive of interest, as will be proven at trial.

89. In addition, defendants' conduct was willful and wanton and plaintiff is entitled to an award of punitive damages.

THIRD CAUSE OF ACTION

(Fraudulent Conveyance -- Against All Defendants -- Sale of TFG)

90. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 89 as if fully set forth herein.

91. TFF's sale of TFG to TFG Acquisition, a company owned by Arthur Kronenberg, constitutes an additional fraudulent conveyance.

92. Defendants knew that CRI and its affiliates had stripped TFG of its assets, through the transfer of certain lease residuals out of TFG and then, directly or indirectly, into CRI, and through the transfer of the share of Apple Leasing, and thus of Apple Leasing from TFG to CRI. Upon information and belief, TFG has been rendered insolvent as a result.

93. Defendants then compounded their actions with respect to the taking of the lease residuals by transferring TFG from CRI and TFF to TFG Acquisition and Kronenberg for a nominal consideration. TFG Acquisition, however, is a shell entity with no assets, and whether it assumes TFG's liabilities, which it did not, makes no difference since TFG is now an insolvent company as a result of the fraudulent conveyances.

94. As a result of this fraudulent conveyance, TFG will be further unable to meet its obligations under the GICC Note, and GICC cannot look to TFG Acquisition to pay the Note,

except through this lawsuit, because TFG Acquisition did not assume TFG's obligations.

95. By virtue of this fraud, GICC has been damaged in an amount of at least $407,021.07, exclusive of interest, as will be proven at trial, in addition to an award of punitive damages.

FOURTH CAUSE OF ACTION

(Rule 10b-5 -- Against All Defendants Except TFG Acquisition and Arthur Kronenberg -- Fraud in Connection with Sale of GICC Note and Issuance of CRI Stock)

96. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 95 as if fully set forth herein.

97. By March of 1990, when all defendants except TFG Acquisition and Arthur Kronenberg were well down the road in their fraudulent plan to strip TFG of all its available assets, such defendants caused TFG to issue the GICC Note. The issuance of the GICC Note constituted the sale of security.

98. In conjunction with the issuance of the GICC Note, all defendants except TFG Acquisition and Arthur Kronenberg, also caused CRI to issue 250,000 shares of common stock, which also constituted the sale of a security.

99. At no time during the negotiation of the terms of issuance of the GICC Note or the CRI stock did such defendants ever disclose that, at the same time they were agreeing to cause TFG to issue the GICC Note and the CRI stock, they were also stripping TFG of sufficient assets to meet the obligations contained in the GICC Note.

100. Defendants' failure to disclose their ongoing plan to strip TFG of assets was willful, and it constituted a material omission in connection with the purchase and sale of a security, which was intended and which did cause GICC to accept delivery of the GICC Note and the CRI stock on the terms set

forth therein, in settlement of certain claims. Had GICC known of defendants' ongoing plan to strip TFG of assets it would not have accepted the GICC Note, at least not without a guarantee from CRI.

101. Defendants' omission constitutes a violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b), and Rule 10b-5 thereunder.

102. By virtue of this fraud in the purchase and sale of a security, GICC has been damaged in an amount of at least $407,021.07, exclusive of interest, as will be proven at trial.

FIFTH CAUSE OF ACTION

(Aiding and Abetting and Conspiracy to Violate Section 10(b) -- Against Defendants Graham, Williamson, Locke, Pierce and Prime)

103. Plaintiff repeats and realleges paragraphs 1 through 102 as if fully set forth herein.

104. Defendants Graham, Williamson, Locke, Pierce and Prime are or were directors of CRI during the time the fraudulent transactions occurred. These defendants, singularly and in concert, engaged in and aided and abetted a plan, scheme and unlawful conspiracy and course of conduct, pursuant to which they knowingly and recklessly engaged in acts, transactions, practices, and courses of conduct which operated as a fraud upon plaintiff.

105. These defendants made various untrue statements of material facts in the SEC filings described in paragraphs 57-76 herein, and omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading to plaintiff.

106. These defendants knowingly and substantially assisted defendants CRI, Apple Leasing, TFG and G&W in committing the violations of Section 10-b and Rule 10b-5 set forth above, and are therefore liable as conspirators and as aiders

and abettors of such violations for the damages suffered thereby.

107. As a result of the foregoing conspiracy and aiding and abetting a violation of section 10(b), plaintiff has been damaged in an amount of at least $407,021.07, exclusive of interest, as will be proven at trial.

SIXTH CAUSE OF ACTION

(RICO -- Against All Defendants -- In Connection With All of the Foregoing)

108. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 107 as if fully set forth herein.

109. Defendants have conducted the affairs of the enterprise TFG through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1962(c). Defendants' multiple fraudulent conveyances constitute a pattern of racketeering activity. Defendants' acts were anything but isolated and sporadic; they involved many transactions concerning many investors and others over a substantial and continuous period of time, and continue to this day. Each of the acts of looting and each fraudulent conveyance described herein involved multiple uses of the mails and the wires, each in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 1343, and each constituting a separate act of racketeering activity as defined in 18 U.S.C. § 1961(1). Defendants also engaged in fraud in the sale of securities, constituting additional acts of racketeering activity, as also defined in 18 U.S.C. § 1961(1), in connection with the issuance of the GICC Note and otherwise, including but not limited to the making of fraudulent SEC filings.

110. Plaintiff was injured in its business and property by reason of defendants' unlawful pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c), entitling plaintiff to treble damages and attorney's fees, in an amount to be proven at trial.

111. In addition, all defendants except TFG and TFG Acquisition have also violated 18 U.S.C. §§ 1962(a)-(b), by receiving income derived from, investing with proceeds derived from and maintaining an interest and control in the enterprise through the unlawful pattern of racketeering activity referred to above.

SEVENTH CAUSE OF ACTION

(CUTPA, etc. -- Against All Defendants -- In Connection With All of the Foregoing)

112. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 111 as if fully set forth herein.

113. Defendants' acts violate the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-llOa-llOq, entitling plaintiff to actual and punitive damages in accordance with the proof at trial.

114. Defendants' acts also violate Conn. Gen. Stat. § 52-564, entitling plaintiff to treble damages in accordance with the proof at trial.

WHEREFORE, plaintiff demands judgment as follows:

(a) Awarding plaintiff compensatory damages on its First, Second, Third, Fourth and Fifth Causes of Action in the amount of at least $407,021.07, the exact amount to be proved at trial;

(b) Awarding plaintiff treble damages on its Sixth Cause of Action in the amount of at least $1,500,000;

(c) Awarding plaintiff actual, treble and punitive damages on its Seventh Cause of Action in the amount of at least $1,500,000;

(d) Awarding prejudgment interest, costs and attorney's fees;

(e) Awarding plaintiff punitive damages in an amount of at least $1,000,000 to be proven at trial; and

(f) Granting such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated: New York, New York
March 24, 1993

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No. 95-1596

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

GICC CAPITAL CORP.,

Petitioner,

vs.

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS WILLIAMSON, GRAHAM & WILLIAMSON, GORDON LOCKE, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, TFG ACQUISITION CORP. and ARTHUR KRONENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below engaged in a proper analysis of the facts alleged in Petitioner's complaint, in light of this Court's holdings in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989), when it rejected Petitioner's claims under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1988) for failure to plead a sufficient "pattern" of racketeering activity.

STATEMENT PURSUANT TO RULE 29.6

There are no parent companies or nonwholly owned subsidiary companies of any of the corporate Respondents represented herein.

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18 U.S.C. § 1961 *et seq.* i

Respondents Andrew Graham, Dennis Williamson, Graham & Williamson, Gordon Locke, Creative Resources, Inc. ("CRI"), TFF, Inc., Apple Leasing, Inc. ("Apple Leasing"), James T. Pierce and Walter H. Prime,[1] respectfully request that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 67 F.3d 463 (2d Cir. 1995); however, for the convenience of the Court, all citations to the opinion will be to the opinion attached as an Appendix ("App.") to the Petition.

STATEMENT OF THE CASE

Petitioner seeks to prolong the long and tortuous history of this action by suggesting that the time is ripe for this Court to revisit RICO's "pattern" requirement — without once demonstrating why the decision below should serve as the vehicle for such a daunting task. Originally styled as a securities fraud case,[2] this RICO action has received more than its fair share of judicial scrutiny, having been amended once, dismissed twice, and the subject of two appeals to the Second Circuit.[3] Every fact

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1. Counsel for Respondents Technology Finance Group, Inc. ("TFG"), TFG Acquisition Corp. and Arthur Kronenberg has notified the Clerk of the Court that those Respondents will rely on this Brief to present their opposition to the granting of certiorari.

2. The federal securities claims were dismissed in 1993. Petitioner did not appeal the dismissal of such claims, and sought to rely instead on its RICO claims as the sole basis for federal jurisdiction (which otherwise would not be present).

3. Ultimately, the Court of Appeals denied GICC's Petition for Rehearing and Suggestion of Rehearing *En Banc*.

alleged and legal argument raised by Petitioner herein already has been briefed, argued to and analyzed by trial and appellate courts. The net result has been the decision, based upon the specific allegations of Petitioner's complaint, that Petitioner failed to plead a "pattern of racketeering activity."[4]

The Second Circuit did not create new law in this case. Nor did it disagree with, misapply, or refuse to apply the law of this Court or any other federal appeals court. Instead, the Second Circuit applied the well-developed body of RICO jurisprudence in determining that the specific facts alleged here simply did not satisfy RICO's continuity requirement. That Petitioner is dissatisfied with the lower court's decision is not a basis for this Court to grant certiorari.

Respondents incorporate by reference the statement of facts set forth in the opinion below, in which the Court of Appeals properly accepted as true only the well-pleaded *factual* allegations — and not the unsupported conclusions — contained in the complaint. In that regard, Petitioner's self-serving characterization of the "facts" is both inappropriate and misleading, in that it ignores the deficiency and illogic of its own pleading. As the Court of Appeals recognized, the complaint on its face alleges that the fraudulent conveyance scheme to "strip" TFG of assets to avoid payment of the Note to GICC began, and involved acts which were completed or well under way, *prior* to the issuance of the Note. *See* App. 3a-4a. Thus, Petitioner's depiction of the "scheme" as having initially been conceived and carried on for the purpose of defrauding Petitioner (or anybody) defies logic and constitutes at best mere

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4. While the Court of Appeals affirmed the dismissal of the entire complaint, Petitioner has not been left without an appropriate remedy. It still may pursue its Connecticut state law claims, which were dismissed only on the basis of lack of supplemental jurisdiction.

speculation.[5] This Court should not accept Petitioner's conjectural novelization of "facts" which — as the Court of Appeals correctly determined — is both unsupported by *factual* pleading and inherently implausible.

REASONS FOR DENYING THE WRIT

The Petition is fundamentally flawed in that it assails the Court of Appeals for making holdings never in fact made. Consequently, each argument advanced by Petitioner is based upon a mischaracterization of the decision of the court below. Ultimately, the sole basis for this petition is Petitioner's dissatisfaction with the result it has received: dismissal of its legally insufficient RICO claim.

A proper examination of the Second Circuit's decision below demonstrates that the court simply did not author the far-reaching and expansive holding that Petitioner insists was the case. As a threshold matter, the holding of the court below is expressly limited to the specific allegations presented and is not indicative of a pronouncement of a new rule of law:

> We are not prepared to conclude that *the specific racketeering activities alleged in*

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5. For example, the allegedly "fraudulent" transfer of Apple Leasing to CRI occurred some nine months *prior* to TFG's issuance of the Note to GICC in March of 1990. Pet. 6. Similarly, the allegedly "fraudulent" use by CRI of Apple Leasing, rather than TFG, to repurchase investors' residual interests began *prior* to the issuance of the Note, and long before TFG defaulted on the Note in late 1992. Further, Petitioner's statement of facts fails to note that TFG paid interest for seven months in 1991 pursuant to the Note and then made interest and principal payments pursuant to said Note for an additional eleven months. Such payments totally belie a "scheme" hatched in 1989 to not pay a then non-existent Note.

> *this case*, occurring over less than one year and *without a threat of future criminal activity*, constitute the sort of "long-term criminal conduct" that Congress sought to target in RICO. Accordingly, the judgement of the district court is affirmed.

App. 11a (emphasis added).

As demonstrated below, the court reached that conclusion only after a thorough analysis of the complaint in light of the well-developed body of RICO jurisprudence of this Court and circuit courts of appeals. Contrary to Petitioner's assertions, neither the holding nor any other portion of the decision below contains, espouses or advocates, expressly or by implication, (i) a "one-year bright-line test" for continuity, (ii) a "criminal-civil distinction," (iii) a so-called "timing of the termination" restriction or (iv) any other doctrinal limitation or restriction on RICO claims other than those already endorsed by this Court.

Indeed, prior Second Circuit decisions — including those cited by the court below — confirm that since the decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*,[6] the Second Circuit expressly has refrained from engrafting any hard-and-fast restrictions onto the RICO statute. For example, in *Metromedia Co. v. Fugazy*, the Second Circuit noted that "there is no bright line test for determining precisely what period of time is 'substantial' for purposes of finding the continuity necessary to establish a RICO pattern." 983 F.2d 350, 369 (2d Cir. 1992), *cert. denied*, 113 S.

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6. 473 U.S. 479, 105 S. Ct. 3275 (1985). In *Sedima*, this Court reversed the Second Circuit's decision dismissing a RICO claim for failure to allege a "racketeering injury" and for failure to allege that defendants had been convicted of the predicate acts of mail and wire fraud or of a RICO violation. 473 U.S. at 492-97, 105 S. Ct. at 3283-85.

Ct. 2445 (1993). More recently, in *United States v. Aulicino*, the Second Circuit expressly rejected defendants' argument that "*H.J. Inc.* holds that Congress granted . . . a RICO-free window of opportunity to engage in numerous racketeering acts, provided that they stopped of their own volition after a few weeks or months." 44 F.3d 1102, 1111 (2d Cir. 1995). Even prior to this Court's landmark decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989) ("*H.J. Inc.*"), the Second Circuit expressed its opinion that Congress did not mean "to exclude from the reach of RICO multiple acts of racketeering activity simply because they achieve their objective quickly or because they further but a single scheme." *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir.) (*en banc*), *cert. denied*, 493 U.S. 811 (1989).

Each of those decisions was cited and followed by the court below. Far from "exemplif[ying] the confusion faced by lower courts" (Pet. 13), the decision below is exemplary of how federal courts have heeded this Court's requirement in *H.J. Inc.* of a flexible, case-by-case and fact-specific approach to civil RICO jurisprudence, and have assiduously avoided espousing any rigid "bright-line" or "black letter" "litmus tests" which would conflict with such an approach.

This is not a case which would have been decided differently but for geography. Petitioner does not point to any ruling of any court which would necessitate a different result. Petitioner trumpets that this Court's prior rulings demand flexibility and a fact-specific analysis of each RICO complaint. Yet, both the District Court and Court of Appeals below employed that approach, albeit in a decision unfavorable to the Petitioner. Not surprisingly, Petitioner complains that the court below was not flexible enough. However, Petitioner fails to point to any ruling below which in any way conflicts either with any other circuit court of appeals or with this Court's suggested approach to

assessing RICO continuity. Instead, the gravamen of Petitioner's argument is that if this Court reviews the complaint and applies a case-by-case fact-specific analysis, it *might* reach a different result. Respondents respectfully submit that such second-guessing is not a proper basis upon which this Court should grant certiorari.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH EITHER THE RICO STATUTE OR THIS COURT'S PRIOR RICO DECISIONS.

Petitioner asserts that the court below espoused a "narrow interpretation" of RICO's "pattern" requirement which conflicts with the statute itself and this Court's construction of the statute. Pet. 14-18. However, this argument — which does not contain a single citation to the decision below — is pure *ipse dixit* and lacks merit.[7] Even a cursory reading of the decision below demonstrates that consistent with *H.J. Inc.*, the Second Circuit (i) properly analyzed continuity both as an "open-" and "closed-ended" concept; (ii) properly applied a multiple-factor test in analyzing open-ended continuity, without limiting the analysis to the question of whether the acts were criminal in nature; (iii) properly observed that since *H.J. Inc.*, courts have considered "a variety of non-dispositive factors" in assessing closed-ended continuity; (iv) properly considered RICO's legislative history and this Court's decisions in *H.J. Inc.* and *Sedima* in noting that "continuity is 'centrally a temporal concept' ";[8] and (v) properly considered prior Second Circuit

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7. Significantly, Petitioner made the same argument to the Court of Appeals in challenging the decision of the District Court. *See* App. 3a.

8. Petitioner's argument that the court below "implicitly ignored" *Sedima* and *H.J. Inc.* (Pet. 15) is symptomatic of its persistent mischaracterization of the decision below.

decisions and decisions of other circuit courts of appeals in determining that the specific facts alleged did not satisfy closed-ended continuity. Petitioner's argument thus ignores the very decision it criticizes.

Most troubling is Petitioner's attempt to downplay the Court of Appeals' determination that the complaint only pled, at most, a pattern spanning eleven months. In arguing that it has alleged a "multi-faceted scheme of fraudulent conveyance activity occurring over a more than two-year period," Petitioner plainly confuses the mere duration of the alleged fraud with the notion of continuity articulated by this Court in *H.J. Inc.* Thus, the critical question is not whether defendants carried out a series of allegedly fraudulent conveyances over a two year period, but rather whether "the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc.*, 492 U.S. at 240, 109 S. Ct. at 2901. Not surprisingly, Petitioner conveniently ignores the fact that the court below properly examined the *predicate acts* themselves, and not simply Petitioner's self-serving attempt to emphasize the longevity of the alleged scheme both prior and subsequent to the alleged fraudulent inducement in 1990. Specifically, the court below rejected Petitioner's attempts to extend the duration of the alleged pattern of racketeering activity by alleging that the scheme began in 1989 — over one year prior to GICC's acceptance of the promissory Note (the non-payment of which allegedly was the focus of the "scheme") — when the CRI defendants took over CRI and Apple Leasing was purchased by CRI from TFG.

First, the court determined that the complaint simply did "not allege any racketeering activity in connection with the CRI defendants' takeover of CRI," and therefore concluded that "the takeover cannot form the starting point of defendants' pattern of racketeering activity." App. 8a. Second, the court concluded that

Petitioner had failed to state a predicate claim of mail and wire fraud in connection with the 1989 purchase of Apple Leasing by CRI from TFG. Again, the court concluded that since the alleged "fraud" involved defendants' failure to disclose this transfer to GICC in 1990, Petitioner could not rely on the date of the transfer in 1989 to extend the duration of the pattern backward in time. App. 8a-9a.

The Court of Appeals thus closely adhered to the teachings of *H.J. Inc.* in concluding that continuity cannot be artificially measured from points in time where no predicate act could be stated as a matter of law. Notably, Petitioner does not — because it cannot — take issue with the Second Circuit's determination that the complaint failed to plead a claim of mail or wire fraud prior to 1990. Petitioner therefore cannot credibly continue to press their view that they have pled a two-year scheme.

Petitioner's argument therefore is reduced to its reliance on RICO's "liberal construction" clause (Pet. 16), and its self-serving conclusion that "the broad requirements of 'pattern' articulated in *Sedima* and *H.J.* are clearly satisfied by GICC's Complaint." Pet. 17-18. Even putting aside that both the District Court and Court of Appeals already have found this very same argument to be unpersuasive, Petitioner's reliance on the RICO statute and this Court's decisions in *Sedima* and *H.J. Inc.* is misplaced. This Court has made it abundantly clear that RICO's broad definition of a "pattern of racketeering activity" is not without its limits, first by introducing the elements of "continuity" and "relatedness" in *Sedima*, 473 U.S. at 496 n.14, 105 S. Ct. at 3285 n.14, and later by articulating a framework for analysis of these concepts in *H.J. Inc.* Of course, *Sedima* is of little precedental value to Petitioner here the Court was not presented with, and therefore did not reach, the question of whether the complaint at issue therein adequately pled a pattern of racketeering activity. And Petitioner's complaint does not

contain allegations remotely approaching the far-reaching six-year bribery campaign at issue in *H.J. Inc.* Neither this Court nor any circuit court of appeals has ever found RICO's continuity requirement to be satisfied based upon specific factual allegations similar to those present here. Contrary to Petitioner's argument, neither the RICO statute nor this Court's precedent requires that RICO be so liberally construed as to encompass Petitioner's pleadings herein.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION.

Petitioner next argues that the decision below "aggravates the existing split of authority within and among the circuit courts." Pet. 18. However, it nowhere identifies the decisions allegedly in conflict, and wholly fails to demonstrate how the decision of the court below conflicts with any other circuit court decision. That is because it does not.

A. No Circuit Court Of Appeals—Including The Court Below—Has Espoused A Bright-Line One-Year Requirement.

Petitioner asserts repeatedly that the court below applied a supposed "one-year minimum requirement" in dismissing the RICO claim for failure to plead requisite continuity, and that such rule purportedly conflicts with decisions of other circuit courts. However, the court below did *not* hold that Petitioner's RICO claim was barred by a supposed "one-year temporal requirement" for closed-ended continuity or, for that matter, by any "bright-line" test of any kind. Indeed, no circuit court of appeals has advocated any such bright- line test. In fact, if there is one thing that all circuit courts agree upon, it is that there can

be no "bright-line" or "litmus test" for determining RICO continuity.

The decision below does not depart from that precedent. The court below advocated and applied a multiple-factor test in examining whether the complaint established closed-ended continuity. The court listed, by way of example, the following "*non-dispositive* factors" to be considered in examining closed-ended continuity:

> the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes.

App. 8a. The court then examined *each* of those factors, although it first focused on the failure of the pleading with respect to the "temporal aspect" of the claim in view of this Court's observation that "continuity is 'centrally a temporal concept.' " App. 10a (quoting *H.J. Inc.*, 492 U.S. at 242).

Initially, as previously demonstrated, the court below noted that while the complaint conclusorily alleges a pattern spanning two years, proper scrutiny of those allegations reveals that the complaint, at most, sufficiently pleads predicate acts spanning only a period of eleven months. App. 8a-9a. The court then made two observations: First, that since *H.J. Inc.*, the Second Circuit has found closed-ended continuity only twice, and in both cases involving an alleged pattern far exceeding eleven months.[9]

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9. Those two prior decisions involved alleged patterns spanning eight years and two years, respectively. *See Jacobson v. Cooper*, 882 F.2d 717 (2d Cir. 1989) (continuity satisfied by predicate acts occurring from 1980 to 1988); *Metromedia v. Fugazy*, 983 F.2d 350 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) (jury instruction that "a few weeks or months" might

(Cont'd)

Second, that other circuit courts "have consistently refused to treat predicate acts occurring over a similar (or even longer) period of time a 'pattern of racketeering activity' under RICO." App. 9a (citations omitted). The court then turned to the other factors considered by other circuit courts of appeals and concluded that none weighed in favor of finding continuity based upon the facts alleged. App. 10a-11a.

That the Second Circuit still has not found closed-ended continuity except in cases involving patterns spanning upwards of two years does not demonstrate that the Second Circuit adheres to any "bright-line" temporal rule, much less the one-year rule proffered in the Petition. Indeed, both a prior Second Circuit decision and a recent Ninth Circuit decision (relied upon by Petitioner) preclude such an expansive view of the decision below. First, in *Metromedia v. Fugazy*, the Second Circuit noted that "there is no bright line test for determining precisely what period of time is 'substantial' for purposes of finding the continuity necessary to establish a RICO pattern." 983 F.2d 350, 369 (2d Cir. 1992). The decision below does nothing to change that view, which is shared by the Third and Ninth Circuits. *See Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991) (declining to "set forth a 'litmus test' to measure duration"); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (declining to impose a "bright-line, one-year rule" for continuity).

Second, the Ninth Circuit in *Allwaste* expressly cautioned against elevating to the status of binding precedent its prior observation in *Religious Technology Center v. Wollersheim*, that it had "found no case in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year." 971

(Cont'd)

constitute "a substantial period of time" held harmless error in light of evidence of predicate acts spanning at least two years).

F.2d 364, 366 (9th Cir. 1992). In rejecting an expansive view of its prior decision, the Ninth Circuit in *Allwaste* concluded that:

> [w]e would be misguided, however, if we construed these observations as establishing a hard and fast, bright line, one-year rule. We did not go so far as to establish such a rigid requirement because it would contradict the fluid concept of continuity enunciated by the Supreme Court in *H.J. Inc., supra*.

65 F.3d 1523, 1528 (9th Cir. 1995).

Petitioner offers no reason why the observations of the court below (which are no different from those of the Ninth Circuit or any other circuit) should be viewed as a bright-line rule — other than the obvious tactical goal of manufacturing a supposed conflict among circuits where none exists. For the reasons stated by the Ninth Circuit in *Allwaste*, the Second Circuit's observations below, which Petitioner seeks to raise to the level of a holding, should properly be read as just what they are — observations. In sum, there is no conflict between the decision below and that of any other circuit court on the question of the required duration for closed-ended continuity: *no* court has established any bright-line test. Indeed, had the Second Circuit been persuaded by Petitioner's view of continuity, the decision below would have been the *first* circuit court decision to have found continuity under the facts alleged. Thus, far from creating a conflict, the decision below avoided one.[10]

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10. Finally, Petitioner's suggestion (Pet. 20) that the Second Circuit has somehow endorsed a "RICO-free window" of opportunity is squarely contradicted by its decision in *Aulicino*, in which it expressly *rejected* such a notion. *See infra* n. 14.

B. The Court Below Did Not Impose A "Civil-Criminal Distinction".

Petitioner also is wrong in characterizing the decision below as having "suggested a distinction between civil and criminal RICO cases" (Pet. 22). Petitioner relies on the following excerpt from the court's decision:

> An inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. . . . Where the nature of the conduct or the enterprise does not by itself suggest that the racketeering activities will continue, courts must look to other external factors.

Pet. 22 (citing App. 6a) (citations omitted).

As a threshold matter, the quoted passage is not the holding of the court below, but rather is unquestionably dictum — as the court below went on to point out, the complaint "does not allege that the nature of the defendants' conduct itself gives rise to a threat of continuity." App. 6a. Further, the court nowhere suggested that open-ended continuity may *only* be established where the predicate acts involve "inherently unlawful" activity. To the contrary, the court emphasized that "courts must look to other external factors," and illustrated this point by discussing two prior Second Circuit decisions in which the requisite "threat of continuity" was shown in the absence of such "inherently unlawful acts" as murder, extortion or embezzlement.[11]

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11. *See* App. 6a, citing prior decisions in *Beauford v. Helmsley*, 865 F.2d 1386, 1392 (2d Cir.) (*en banc*), *vacated and remanded*, 492 U.S. 914, *adhered to on remand*, 893 F.2d 1433, *cert. denied*, 493 U.S. 992 (1989), and *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521 (2d Cir. 1994).

Thus, the court did not end its analysis of open-ended continuity upon concluding that the complaint did not involve "inherently unlawful acts." The court properly examined the specific factual allegations to determine whether they were "sufficient to suggest a threat of continuity." App. 6a-7a. The court employed precisely the type of "flexible approach" and specific factual analysis endorsed by this Court in *H.J. Inc.*

That the court ultimately found GICC's allegations to be insufficient simply does not support Petitioner's view that the Second Circuit has drawn a distinction between criminal and civil RICO cases. The court's citation to its prior decision in *Aulicino* demonstrates the contrary to be true. In *Aulicino*, the Second Circuit held that a three and a half month kidnapping spree constituted a RICO pattern where the evidence demonstrated that the defendants had plans to commit further kidnappings.[12] Significantly, the *Aulicino* court based its continuity analysis on an extensive discussion of *H.J. Inc.*:

> The *H.J. Inc.* Court stated that a threat of continuity exists, for example, where the predicate acts "include a specific threat of repetition extending indefinitely into the future," . . . or where the acts form "part of a long-term association that exists for criminal purposes," . . . or where the acts constitute "a regular way of conducting [an] ongoing legitimate business,". . . .
>
> * * *
>
> The *H.J. Inc.* Court preceded the above

12. We note that Petitioners inaccurately describe *Aulicino* as involving an embezzlement scheme, and wholly overlook the court's extensive discussion of, and reliance on, *H.J. Inc.*

> examples with an express disavowal of "any claim to cover the field of possibilities," . . . stating that it was preferable to "deal with this issue in the context of concrete factual situations presented for decision,". . . . Since Congress intended the courts to take a "flexible approach," . . . the sufficiency of a party's proof of a threat of continuity will "depend[ ] on the specific facts of each case,". . . .

44 F.3d at 1111 (citations omitted).

Thus, the *Aulicino* court drew upon *H.J. Inc.*'s suggestion that a threat of continuity may be established by showing that the enterprise "exists for criminal purposes," and employed the recommended "flexible approach" to conclude that despite the relatively short duration of the pattern at issue, continuity had been demonstrated by proof that defendants had specifically banded together to plan and perpetrate a series of "inherently unlawful acts" — *i.e.*, kidnappings — and evidence suggesting that such kidnappings were planned to continue, and would have continued had the defendants not sensed that their plans were about to be revealed.

Petitioner certainly cannot (and does not) seriously assert that the *Aulicino* court was too rigid in its approach or too narrow in its view of continuity. Nor can it credibly assert that the court below was any more rigid in its approach, as that court notes that the presence of "inherently unlawful acts" is just *one* of the factors to be considered in determining the existence of open-ended continuity. The fact remains, however, that the court below was not faced with allegations of conduct of the type presented in *Aulicino*, and accordingly did not confine its analysis to the nature of the acts alone. Instead, the court properly

employed a flexible analysis in scrutinizing the specific allegations to determine whether a threat of continuity existed. Contrary to Petitioner's suggestion, the court's determination that no such threat was presented under the specific facts alleged simply does not constitute a far-reaching ruling at odds with other circuit court decisions or prior precedent of this Court.[13]

C. The Court Below Did Not Hold That Conduct Which Is Terminated Prior To Suit Cannot Satisfy RICO's Continuity Requirement.

Petitioner advances a third misguided argument in suggesting that the court below imposed a so-called "timing of the termination restriction" in holding that Petitioner's allegations did not establish a requisite threat of continuity. However, this argument is wholly unsupported by either the decision below (which Petitioner fails to cite) or any decision of any other court (including those cited in the Petition).

The court below did *not* hold that continuity cannot be established where an alleged pattern terminates prior to prosecution of suit. Instead, in its discussion of "open-ended" continuity, the court below carefully scrutinized Petitioner's allegations directed toward establishing a threat of continuity. First, the court found "unpersuasive" the Petitioner's argument that "the defendants would have continued to loot TFG if not for the fact that all available funds had already been looted" in light of the inherent terminability of the alleged scheme. App. 6a-7a. As the court observed, "once the pool of investor interests

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13. Finally, Petitioner's reliance on *Sedima* is misplaced. In rejecting a prior criminal conviction requirement in *Sedima*, this Court did *not* hold that the criminal nature of the acts or the enterprise could not be considered as a factor in assessing continuity. Indeed, as demonstrated above, this Court in *H.J Inc.* expressly endorsed consideration of the criminal nature of predicate acts in determining the existence of a threat of continuity.

available for repurchase was exhausted" — a fact admitted by Petitioner — the alleged predicate acts "*could not* have continued." App. 7a (emphasis in original). The court thus determined that as a matter of simple logic, the alleged looting had by its own nature reached an absolute and natural end. App. 7a. Second, the court concluded that Petitioner's additional argument that "CRI would have continued to transfer money overseas had GICC not commenced litigation" was "entirely speculative." App. 7a.

Petitioner argues that these rulings would render civil RICO fraud claims "all but impossible to plead" since, in its view, "if a plaintiff files suit before enough time has elapsed to establish continuity, the threat of continued racketeering activity typically will not exist." Pet. 24. However, Petitioner's argument conveniently ignores that this Court previously addressed this concern by distinguishing between "closed-ended" and "open-ended" continuity in *H.J. Inc.*:

> Often a RICO action will be brought before continuity can be established in this way [*i.e.*, through "long-term criminal conduct"]. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

492 U.S. at 242, 109 S.Ct. at 2902 (emphasis in original).

As demonstrated above, the Second Circuit in *Aulicino* found a requisite "threat of continuity" even where duration was plainly lacking.[14] While the court below was not faced with the

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14. The defendants in *Aulicino* argued that both the short duration of their pattern of conduct and the fact that their activities ended before the prosecution commenced precluded any finding of a requisite threat of continuity. 44 F.3d at 1110. First, the *Aulicino* court expressly rejected the

(Cont'd)

compelling circumstances present in *Aulicino* — *i.e.*, evidence suggesting that additional kidnappings were planned — it nonetheless examined Petitioner's complaint for allegations supporting a threat of continuity before concluding that such allegations were both illogical and speculative.

Petitioner cannot point to any portion of the decision below which suggests that the Second Circuit has departed from its prior *rejection* of the "timing of the termination restriction" in *Aulicino*. Thus, Petitioner's argument should be recognized and rejected as a thinly-disguised attempt to have this Court review the Second Circuit's exhaustive analysis of the complaint's allegations simply because Petitioner is dissatisfied with the outcome below.

D. The Purported "Other Confusing and Conflicting 'Pattern' Tests" Are Not Related To The Decision Of The Court Below.

Petitioner advances a final, catch-all argument intended to illustrate the purported "confusion" among circuit courts concerning various factors used to assess RICO continuity. Petitioner concedes that these "other tests" were not adopted by the court below, but suggests that "[g]ranting certiorari in this

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(Cont'd)
notion of a "RICO-free window of opportunity to engage in numerous racketeering acts, provided that they stopped of their own volition after a few weeks or months." *Id.* at 1113. Second, the *Aulicino* court concluded that despite the short duration, the threat of continuity had been established by the nature of the activities (*i.e.*, a series of planned kidnappings), the "modus operandi" of the kidnapping ring (*i.e.*, posing as police officers, thereby increasing the likelihood that the victims would be murdered to conceal the perpetrators' identities), the fact that the kidnappers had planned, but had not yet attempted, additional kidnappings, and the additional fact that the plan had not terminated of its own design, but rather was abandoned once the defendants sensed that they were about to be exposed.

case can assist other circuits in interpreting what is a 'pattern' under RICO." Pet. 25. Initially, we note that this Court declined to grant certiorari to review several of the decisions relied upon by Petitioner as examples of the supposed "substantial confusion in the lower courts," and Petitioner offers no compelling basis for this Court to do so now, particularly since — as Petitioner concedes — the decision below did not address such issues. In any event, that other circuit courts have considered a multitude of factors in analyzing continuity in disparate factual scenarios serves only to confirm that this Court's advocacy of a flexible, case-specific approach has been adhered to by those courts.

Ultimately, Petitioner seeks to have this Court undertake the monumental task of sorting out the fact-specific holdings of myriad circuit court decisions for the alleged purpose of eliminating confusion. Ironically, accomplishing such a task would also require this Court to do precisely what it has expressly refused to do, and what Petitioner claims is forbidden by the RICO statute itself: *i.e.*, to establish rigid, "bright-line" tests for determining precisely whether a pattern of racketeering activity has been pled. We submit that this Court need not, and should not, undertake such a task, particularly in this case.

In sum, since *H.J. Inc.*, *no* circuit court of appeals has imposed or adhered to any (i) bright-line test for duration, (ii) civil/criminal distinction, (iii) so-called "timing of the termination restriction" or (iv) any other hard-and-fast doctrinal limitation on RICO's pattern element. Thus, there simply are no conflicts for this Court to reconcile, much less conflicts between the decision below and either this Court's prior precedent or any other circuit court rulings. Petitioner's statement of the "question presented here" therefore is purely hypothetical and not ripe for adjudication either generally or as it pertains to this case. Far from "exemplif[ying] the confusion faced by the lower courts," the Second Circuit's decision below exemplifies the

great care and judgment which lower courts have exercised in applying this Court's decisions in addressing the continuing onslaught of RICO actions. Petitioner offers no compelling basis for this Court to prolong this action, and this Court should, therefore, decline to do so.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH THE PRIOR DECISION ON APPEAL.

As a final point, Petitioner attempts to conjure a "conflict" between the Second Circuit's two decisions in this action. Petitioner's argument compares apples with bananas. In the prior appeal in this case, the Second Circuit was faced with a threshold question of whether GICC had proper *standing* to bring a RICO claim, and not whether GICC had properly pled the pattern element. That first appeal was from the District Court's dismissal of the RICO claim on the ground that GICC lacked standing because the alleged looting scheme was not directed at GICC, but only at TFG. The Second Circuit reversed, concluding that GICC's "allegations satisfy the proximate cause requirement for RICO standing." App. 20a. While the court concluded that allegations concerning the timing and magnitude of the Note and "the rapacious nature of the alleged looting" were sufficient to satisfy the "directness of injury required for RICO standing" (App. 20a), the court was not faced with the question of whether such allegations were sufficient to satisfy RICO's pattern element. That the Second Circuit later subjected those same allegations to a proper analysis consistent with this Court's approach to continuity in *H.J. Inc.* and concluded that continuity was not satisfied does not suggest that the court's two decisions stand in conflict, much less that such distinct decisions are "irreconcilable."

Petitioner also asserts that in the second appeal, the Second Circuit "inaccurately" described the alleged pattern and thereby "shortened" it. Pet. 29-30. However, as demonstrated above, Petitioner again misses the point: the relevant inquiry does not turn on the duration of an alleged fraud, but rather on whether a plaintiff has properly pled two or more predicate acts which themselves are related and "amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239, 109 S. Ct. at 2900. The court below therefore did not "shorten" the alleged pattern, but instead determined that GICC had failed to plead any predicate claim of mail or wire fraud prior to March 1990 or after February 1991, and that such alleged pattern did not satisfy RICO's continuity requirement. The flaw therefore does not reside in the Second Circuit's analysis, but rather in GICC's pleading.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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